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PRINCIPLES OF AMERICAN STATE ADMINISTRATION

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PRINCIPLES OF AMERICAN STATE ADMINISTRATION

BY

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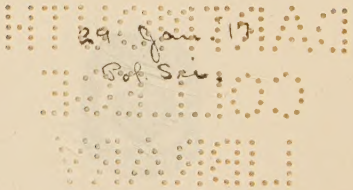

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TO

WESTEL WOODBURY WILLOUGHBY

WITH TRUE REGARD

PREFACE

It has often been remarked that, in recent times, constitutional questions, which formerly held the front of the stage, have moved to the background, and problems of administration have become increasingly more prominent and urgent. Public attention is today being directed to the administrative side of government to a greater extent than ever before. It is now realized that efficient administration, formerly considered more appropriate to monarchical governments, is no less essential to a democratic government and is, indeed, intimately connected with the furtherance of true democracy. Acquaintance with the administrative activities of the American state governments is of peculiar importance to every citizen of the forty-eight commonwealths, since they constantly affect his life and well-being at manifold and vital points.

In view of these facts, it is surprising that there has heretofore been no published attempt to describe comprehensively and systematically the organization and functions of the state administrative authorities. We have several such descriptions devoted to particular states or to certain phases of state administration, but they are usually too specialized or narrow in scope to be of more than local or restricted interest. The present volume has been prepared in the hope that it may fill, to some extent at least, the need indicated. It is based in part upon a college course in state administration which the author has given for the last six years, first at Princeton University and later at the University of Illinois, and in part upon researches undertaken by him on behalf of the Efficiency and Economy Commission of Illinois. No attempt has been made to describe exhaustively all of the multifarious activities and

functions of the American states, for such a task would have far exceeded the limits of this volume, even had the author felt qualified to perform it. The aim has been rather to select for description those services and functions which appear most to deserve attention, either because of their intrinsic importance or because of their suitability for illustrating the general principles of state administration. In Part II considerable space has been devoted to a description of the organization of state administrative authorities, in the belief that a working knowledge of this phase of the subject is essential to the study of state functions, described in Part III. The author has endeavored, as far as possible, to avoid the pitfall of making generalizations on insufficient data. He has not deemed it best, however, to encumber the pages of the book with numerous specific references to all the particular states which may be included in a general statement, because the book is not designed to form a reference book of specific information regarding the administrative structure and activities of any particular state, but rather to describe the general tendencies and principles which underlie the administrative organization and work of all the states. He has endeavored to bear in mind that facts are constantly changing, while principles remain relatively fixed, and has therefore placed the emphasis upon the principles, and has used facts, as a rule, merely for purposes of illustration.

The extent of the author's indebtedness to others is indicated by the lists of references appended to each chapter, as well as by the footnotes. These lists are not intended to be exhaustive, but to indicate the most important or the most available sources for the further study of the various topics discussed. The author desires to make acknowledgment to Professors J. W. Garner, J. A. Fairlie, M. H. Robinson, W. F. Dodd, A. C. Hanford and E. H. Downey for their kindness in permitting the use of extracts from their writings which are reprinted herein. He desires also to express his gratitude for

valuable suggestions and criticisms to his colleagues, Professors Garner, Fairlie, E. B. Greene and C. H. Johnston, all of whom have read portions of the manuscript or proof. The author, however, is alone responsible for errors, whether of fact or of judgment, which, on account of the multitudinous variations and constant changes in the law and practice of state administrative structure and function, he cannot hope wholly to have escaped.

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PART I

INTRODUCTION

CHAPTER I

GENERAL PRINCIPLES

The work of government may be broadly divided into two primary parts, that which is concerned with the formulation of public policy, and that which has to do with the execution of such policy. The first we call legislation and the second administration.[1] The term "administration" may be used as referring either to the body of officials whose characteristic function is the execution of public policy, or to the exercise by public officials of their powers and duties in carrying out actual governmental operations. In the former sense administration denotes the structure or organization of the executive and administrative authorities, while in the latter sense it denotes the function of executing public policy. Administrative law consists of the body of rules which determine the organization of the executive and administrative authorities and the scope and limits of their powers, duties and functions.[2] Administrative law and constitutional law may sometimes overlap, for the latter is peculiarly concerned with

[1] M. Block defines administration as "the group of public services intended, by the execution of the laws, to provide for the needs or collective interests of the citizens; including also the attributions of these services, their powers and mode of action." *Dictionnaire de L'Administration Francaise,* i, 13. M. Cooreman, in his opening address before the First International Congress on the Administrative Sciences, defined administration as meaning "three things closely connected yet distinct; the totality of the powers and duties of the executive authority; the exercise of these powers and duties; and the body of officials or administrative personnel." *Rapports et Comptes Rendus du Congrès International des Sciences Administratives,* v, Part II, p. 6.

[2] Cf. Freund, *Cases on Administrative Law,* p. 1; Goodnow, *Principles of the Administrative Law of the U. S.,* p. 17.

the structure or organization of governmental authorities. In the study of administration, however, it is almost necessary to include some consideration of the organization of the administrative and executive authorities. This need arises not merely from the fact that constitutions seldom provide fully for the organization of such authorities, but more especially from the fact that questions of organization and of function are so intimately related that it is desirable to consider each in order the better to understand the other. The line of demarkation between organization and administration is not clearly drawn. The character and extent of the work to be done largely determines the type of the organization. Furthermore, the character of the organization affects the action of the administration, just as the efficiency of a machine in doing its work is affected by the adaptability of its construction for the purpose. In this work no attempt is made to keep these two sets of questions strictly separate, but in Part II we shall be primarily concerned with matters of organization, while in Part III we shall devote our attention mainly to a description of functions.

Administration, whether viewed from the standpoint of organization or from that of function, is as old as government itself. In early or primitive governments, however, it is found naturally in a very rudimentary form. Under such conditions there exists little or no differentiation either of structure or of function. The few and meager functions which the government undertakes to perform are concentrated in the hands of a single person, or a small group of authorities. In fact, it is only at a relatively late period in the history of political institutions that governments assume the performance of functions other than those necessary for the bare maintenance of national life. As the result, however, of the impact of political, economic, and social forces upon the governmental system, the administration reacts to the stimulus of changing conditions and becomes more highly dif-

ferentiated in structural partition and functional development.

The development of the administrative system has been retarded, however, as the result of the prevalence at different times of certain political theories or doctrines. During the sixteenth and seventeenth centuries, whatever influence the contract theory of the origin of the state exercised upon the scope of state activity in Europe tended towards the arrest of functional development. The doctrines of *laissez faire* and of individualism, which, at a later period, acquired great currency, particularly in Anglo-Saxon countries, tended in the same direction. By those who held these doctrines, any activity on the part of the government beyond that which was absolutely necessary was regarded with aversion as tending to stifle private initiative. The *laissez faire* doctrine was a natural protest and reaction from the excessive extension of executive power in monarchical governments. The government was considered as a tyrant and even the principal enemy of the welfare of the people. It was a common idea even as late as the middle of the nineteenth century that "all government is a satire on human nature and is made necessary by the vices and ambitions of men." [3] The increasing degree of democratic control over the government, however, has brought about a change in the attitude of the people towards the government, so that they no longer regard it as a tyrant or necessary evil, but as their natural protector against the encroachments of aggregations of capital upon private rights.[4] Hence, the activities and increasing functions of government now arouse little alarm.

At the present time, the force of circumstances and the changes in those varied and manifold conditions which go to make up the environment of the government have loosened

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[3] *Debates and Proceedings of the Maryland Constitutional Convention of 1851*, i, 501.

[4] Cf. Wambaugh, "The Scope of Government," *Atlantic Monthly*, Jan., 1898.

the hold of these restrictive doctrines upon the public mind and policy. The increasing complexity of modern social and industrial conditions, combined with the awakening of the sense of social solidarity and the coming into existence of new and unplumbed phenomena, necessitates more and more the interference of the state for the purpose of regulating and controlling the operations of business and the processes of life. New functions are undertaken by the state as the result of an effort, partly instinctive, partly conscious, to adapt itself to changes in this environment. The functions now undertaken by the modern state are usually classified into five groups, viz.: those relating to foreign affairs, military affairs, the judicial system, financial affairs, and internal affairs. The group of functions relating to internal affairs may be subdivided into two classes, repressive and developmental. Police activity in limiting the freedom of action of individuals is repressive in character, while the maintenance of a system of public instruction is an example of a developmental function.[5]

The development of new functions of government and the expansion of old ones has been accompanied by a simultaneous process of partition in the structure of the administrative organization. New organs have been formed which assumed new functions or exercised old ones transferred to them from existing organs. Thus, in England, the functions exercised by Parliament and the Courts were originally possessed by a single authority, but gradually became separated from the main stem, the Crown. Montesquieu, writing in the eighteenth century, concluded that, since there were in England at that time three more or less separate departments

[5] This five-fold classification, it will be noticed, is based upon a different principle from that of the more primary and fundamental classification already given, into legislation and administration. Each of the five classes of functions mentioned involves both the formulation and the execution of public policies.

of government, therefore the powers of government are three-fold, viz.: legislative, executive, and judicial.[6] The inference which he drew from his study of the English Government was that the proper organization of government requires that each of these powers should be assigned to its appropriate department, and that no department should exercise any kind of power other than that assigned to it. This famous doctrine of the separation of powers was accepted as a fundamental maxim of government by the framers of the first American Constitutions, who embodied it in these instruments, and it thus became a part of American public law in both state and nation. It has not been found practicable, however, to apply the doctrine strictly and, by constitutional provision and judicial construction, numerous specific exceptions to it have been made. The difficulty in applying the doctrine arises from certain fundamental misconceptions underlying it.

In the first place, Montesquieu fell into the error of confusing powers or functions of government with sets of authorities established to exercise them. This error led him to the untenable assumption that the emergence of three more or less independent departments of government necessarily indicated the existence of the same number of fundamental and essentially distinct powers or functions of government. As already pointed out, there are but two primary and fundamental powers or functions of government, viz.: the formulation and the execution of policies. There is no definite limit, however, to the number of more or less independent departments or sets of authorities that may exist in a given government. There can scarcely be, in the nature of things, any exclusive assignment of one of the two primary functions of government to a single department, but the work of each department involves the exercise of a combination of such functions. The executive department both influences the

[6] *L'Esprit des Lois,* Bk. XI, Ch. IV.

formulation of public policies and is intrusted with their execution, while the judicial department both legislates and administers. Usually, however, one of the two primary functions will be found predominant in the work of a given department. Thus, the work of the legislative department consists mainly in the formulation of public policies, while that of the executive department usually consists mainly in the execution of such policies.

In the second place, Montesquieu, in evolving his doctrine of the separation of powers, failed fully to appreciate the necessity for the interdependence of the departments of government. Just as, in the various forms of organic life, the process of differentiation of structure and function is accompanied by the development of correlative means of integration, so, in the field of political life, the division of the powers of government among more or less separate departments is accompanied by the creation of certain ligaments or connective tissue binding them more or less closely together. Without such means of integration, the government would consist of a series of disjointed departments and authorities, among which harmonious action would frequently be impossible. This necessary integration of the departments of government is secured to some extent through the common control exercised by the sovereign power in the state over the organization of the various departments, but more especially through the creation of avenues of control exercised by one department or authority over another. Where the legal sovereign is quiescent, or the organization of the government such as to render the control of the political sovereign ineffective, dependence for the necessary means of integration must, in the first instance, be had upon the reciprocal control of the various sets of authorities over each other. In case, however, the laws regulating the organization and relations of the different departments do not sufficiently provide for such avenues of control, the necessary control may

grow up in an extra-legal fashion outside the governmental system. Thus, in the United States, the political party has, as one of its most important functions, the at least partial integration of the more or less separate departments and officers of government.[7] In addition to the extra-legal control of the political party, avenues of interdepartmental control are also provided.

The different forms of control over the administration which have been evolved may be classed as popular, political, legislative, judicial and administrative. Some of these forms of control may overlap or merge into each other, while some may exist separately and simultaneously. Popular and legislative control are forms of political control, but political control over the administration may also be exercised extra-legally through the political party. The control of the political party over the administration is secured through the successful efforts of a particular party organization in controlling the election or appointment of officers to executive and administrative positions. Such control is legitimate in so far as it tends to harmonize the activities of such officers with each other and with the policy-determining organs of the government for the more effective execution of the popular will, but it may have an injurious effect upon administrative efficiency if utilized for the perpetuation of the existence of the party organization.[8]

Popular control over the administration is secured to a limited extent through the rather vague and indefinite influence of public opinion over administrative action. Thus, where public opinion in a certain locality of the state is favorable or opposed to the enforcement of a given state law, the activity or non-activity of the law-enforcing officers is apt to be correspondingly influenced. Such extra-legal influence of public opinion is capable of exertion, however, through the

[7] Cf. Ford, *Rise and Growth of American Politics*, p. 215.

[8] Cf. Goodnow, *Politics and Administration*, p. 37.

possibility of the exercise by the people of legal and more tangible means of control. The legal methods of popular control over the administration consist in the adoption of constitutions and amendments thereto, the initiative and referendum in ordinary legislation, and in the election to, and recall from, public office.[9] The organization of the executive department and the competence of the executive and administrative authorities are to some extent determined by most of the constitutions. In no case, however, are these matters fully provided for in the constitution. Even if they were so provided for at any given time, the constant growth of administrative functions would cause such a continual need of changes and additions in the administrative organization that constitutional revision could scarcely be expected to keep pace with the new developments. Power to supplement or extend the constitutional provisions regarding the organization and competence of the executive and administrative authorities must therefore be vested either in the legislature or in the higher constitutional officers of the executive department. In the American states the former alternative is adopted. Upon this point the constitutions are usually silent, but the lodgment of this power in the legislature results from the generally recognized principle that the legislature is a body of residuary powers, while the executive department is largely a body of delegated powers.[10]

Of the legal forms of control over the administration in the American states, that of the legislature is one of the most extensive and pervasive. A large part of the work of the legislature consists in the passage of laws creating new organs and functions in the executive department, or rearranging those already in existence, and giving detailed directions as to the exercise of their powers and duties by the designated organs. Thus, the legislature may require

[9] On the recall, see below Ch. VIII.

[10] Field *vs.* People, 3 Ill., 79.

that the governor shall reside at the seat of government, and, in general, that he shall perform duties other than those specified in the constitution not incompatible with his dignity and constitutional functions.[11] The legislature may intrust the performance of many legal duties either to the governor or, at their option, to any other executive or administrative officer.[12] The secretary of state of Indiana was directed by joint resolution of the legislature to publish certain laws as soon as convenient,[13] and it was held by the Supreme Court of the state that that body had the right to direct him in the discharge of his official duties.[14] Again, it is within the power of the legislature at any time to extend or abridge the powers or duties of the attorney-general.[15] In South Dakota the legislature has provided by law that the state treasurer shall make to the governor a monthly statement of the exact condition of the public funds in his possession.[16] In these various ways the legislature enters intimately into the business of regulating the administration.

Furthermore, the legislature by joint ballot may in some states appoint officers of the executive department, while in most states the upper branch of the law-making body has the power of confirming the appointments of the governor. The legislature may also often prescribe the qualifications for holding executive or administrative offices, may determine the length of the term, and may remove the incumbent from office before the expiration of the term by impeachment, by the abolition of the office, or in some cases by merely declaring the office vacant. Thus, the legislature of Michigan, in providing for the consolidation of the several state institu-

[11] Shields *vs.* Bennett, 8 W. Va., 74.

[12] Slack *vs.* Jacob, 8 W. Va., 612.

[13] Indiana Acts of 1852, p. 178.

[14] State *vs.* Bailey, 16 Ind., 46; see also Pinckney *vs.* Henegan, 2 Strob. (S. C.), 250.

[15] People *vs.* Santa Clara Lumber Co., 106 N.Y.S., 624.

[16] South Dakota Compiled Statutes, 1913, p. 88.

tions, abolished their boards of managers and annulled all appointments of officers at said institutions.[17] Through the control thus exercised over the personnel of the administration, the legislature is enabled to exert an important influence over the carrying on of the administrative services. Of even greater importance, however, in this respect, is the legislative control of the public purse. New organs cannot be created, nor new functions undertaken, nor can the old ones be maintained without provision being made by the legislature for the necessary financial support. Through the medium of detailed appropriations, the legislature is able to exert an influence which permeates every branch of the administrative system.[18] It thus appears that, in the several respects mentioned, viz.: in providing for the organization and competence of the executive and administrative authorities, in creating and terminating membership in the administration, and in making detailed appropriations for the carrying on of the administrative services, the work of the legislature is not properly legislation but administration. "The legislature thus becomes in a sense the central administrative authority of the state." [19]

The control exercised by the legislature over the administration is to a certain extent legitimate and even necessary in order to secure the requisite harmony of action between these departments of the government. The representatives of the people in the law-making body should be in a position to criticize the administration and to prevent or remedy any abuses which may grow up in the conduct of the administration. If, however, legislative control is extended farther than necessary for the accomplishment of these objects, it may exert an injurious influence both upon the legislature

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[17] Michigan Acts of 1891, No. 140; Attorney-General *vs.* Jochim, 99 Mich., 358.

[18] See, for example, Illinois Session Laws, 1915, pp. 12 ff.

[19] Freund, "American Administrative Law," *Political Science Quarterly*, ix, 413.

and upon the administration. Control by the legislature, though legitimate within limits, should not be extended so far as almost completely to destroy the independent action of the administration, so that the latter becomes a mere tool in the legislative hand. Legislative control is political control, and therefore should be confined to the general features of administration. Statutes should not contain elaborate and detailed administrative provisions, but such details should rather be left to the discretion of the executive. The injection of political considerations in the administration weakens the executive authority and renders the administration inefficient. The injurious effect of political considerations is especially marked when it touches the personnel of the administration. As Woodrow Wilson pointed out many years ago, "Politics sets the tasks for administration; but it should not be suffered to manipulate its offices." [20] The legislature's power of patronage, which it formerly enjoyed to a greater extent than at present, has been declared to be "the one power which has gone far to discredit legislative bodies and has been the chief means of producing so much hasty and ill-considered legislation." [21]

Although legislative control over the administration in the American states has been extended to considerable lengths, it cannot in the nature of things entirely displace administrative control. It is impossible for the legislature to foresee and to provide in detail for all emergencies that may arise in the course of administrative action. Moreover, the facts and processes of life in the twentieth century are frequently so complex and technical that the legislature is not well fitted to deal with them. Hence, a certain amount of discretion must be allowed to the administrative authorities in dealing with conditions as they arise. In such matters, for example, as

[20] "The Study of Administration," *Political Science Quarterly*, ii, 210.

[21] *Debates and Proceedings of the Ohio Constitutional Convention of 1850*, p. 90.

the regulation of railroads and of the working conditions of laborers in factories, purely legislative control has been found to be impracticable in many respects and considerable discretionary power, therefore, has been lodged in the hands of administrative officers and departments. This growth of discretion on the part of administrative officials has, to some extent, released them from the control not only of the legislature but also of the judiciary.[22]

Legislative control is, from its very nature, subject to another serious limitation. The legislature may enact regulations for the guidance of the conduct of the administration, but such regulations do not necessarily result in control over the administration unless some means are provided for seeing that the regulations are carried out. The legislature, partly on account of the character of its organization and partly on account of the fact that it is ordinarily in session only a comparatively small portion of the time, is not well adapted directly to oversee the carrying out of the regulations which it may enact. The law-making body, it is true, usually has standing committees to which is assigned some degree of oversight of the executive departments. Special committees of the legislature may also be appointed from time to time to investigate the various branches of the administration, and to bring to light any abuses in the administration or any derelictions of administrative officials. Such committees are sometimes vested with the power to subpena witnesses and to punish for contempt. The control exercised by the legislature through such committees, however, is, as a rule, special and temporary, rather than regular and permanent.

The most usual means whereby the statutes enacted by the legislature for the control of the administration are carried

[22] Cf. Goodnow, "The Growth of Executive Discretion," *Proceedings of the American Political Science Association,* ii, pp. 29-44; *Inaugural Address and First Message of Governor Cox of Ohio, 1913,* p. 19; "Report of New York Factory Commission, 1912," pp. 803-5.

into effect is through the action of the courts. Through its power of construing and enforcing the acts of the legislature relating to the administration, the judiciary exercises, both in civil and in criminal cases, a very far-reaching control over the competence of administrative officials. It is to be noted, however, that in so far as the jury system is used, an element of popular control is injected into the jurisdiction of the courts. The power to delimit the scope of action of administrative officials is also possessed by quasi-judicial tribunals, such as boards of review in tax cases. Such tribunals, however, may be considered as primarily administrative bodies of a special class.

A further control of the judiciary over the administration arises from the power of the courts to issue extraordinary legal and equitable remedies, such as the *mandamus,* the injunction, and the *quo warranto.* These writs are issued, as a rule, only in the discretion of the courts; that is, not as a matter of course, but only when probable cause is shown. They are designed primarily to compel the performance or non-performance on the part of administrative officials of certain acts required or prohibited by law, rather than the imposition of damages or penalties for the violation of law. They are thus essentially anticipatory rather than retrospective in character. It is to be noted, however, that the writ of *mandamus* will not issue to compel officers of the administration to perform acts of a political nature or which involve the exercise of official discretion. This is particularly true in reference to the governor. Many courts hold that, in order to avoid conflict between the judicial and executive departments, the writ of *mandamus* will not issue to compel the governor to perform even a ministerial act required of him by law.[28]

[28] See, for example, People *vs.* Bissell, 19 Ill. 229; State *vs.* Governor, 25 N. J. L. 331; Rice *vs.* The Governor, 207 Mass., 577; People *vs.* Board of State Auditors, 42 Mich., 422; Lamar *vs.* Croft, 53 S. E. 540;

The courts sometimes assume the immediate direction of administrative matters, as, for example, in bankruptcy proceedings or in winding up the affairs of a bank. In cases of this kind the lack of suitability of the courts for such work becomes especially apparent. Administrative action in such cases would undoubtedly, as a rule, be more efficient than judicial. Likewise, administrative control over the performance of administrative work would be more conducive to efficiency of action than judicial control. The latter method of control aims primarily at the protection of private rights against encroachment on the part of administrative officials, while the former is more concerned with the promotion of the social welfare through the increased efficiency of the administration. If efficiency of administrative action is adopted as the primary object to be secured, then it must be admitted that administrative control over the administration is more effective for this purpose than either judicial or legislative control.

Administrative control over the administration has been a slow growth in the American states, and is even yet in a rudimentary stage of development. Such a method of control, if fully developed, would require that the administration be organized in hierarchical form with a definite head to whom the other administrative officials should be subordinate, not merely in name or theory, but in reality. This graduated subordination would be secured in part through the power of each superior officer to select his subordinates. Inasmuch, however, as appointment in itself is an imperfect form of administrative control, there should be vested in the superior officer the power of removal and, occasionally, the power of discipline. Such an administrative system is that which has sometimes been described as "a government of men and not of laws," for the subordinate officers would be

Rice *vs.* Austin, 19 Minn., 103; but compare Elliott *vs.* Pardee, 149 Calif., 516. On the whole matter, see *Michigan Law Review,* iii, 631.

directed in the performance of their detailed duties, not by the laws enacted by the legislature, but by the orders of their superior officers. This system would not necessarily do away with popular control, for the head of the administration would still be elected by popular vote and might also be subject to the popular recall. It would merely relieve the voters from the need for attempting to exercise what is in reality an administrative power, viz., the election of a large number of subordinate, non-policy-determining officials. The release from the need of performing this function would probably increase the degree of control exercised by the people over the administration.[24]

Such considerations, however, have had little influence in determining the actual character of the administrative organization in the American states. The hierarchical method of organization was considered as incompatible with our democratic institutions and as savoring too much of European monarchical systems, from which we desired to escape. Our democratic institutions had been set up as a result of a reaction from the excessive growth and domineering character of executive authority. This reaction was accompanied by the feeling that the methods and forms which had made the executive authority strong and efficient should be strictly avoided. This feeling is shown in the provision of the Massachusetts bill of rights of 1780 that "this government shall be a government of laws and not of men." [25] The same idea was expressed by Mr. Simmons in the New York Constitutional Convention of 1846. He "wanted to avoid by any possible implication that by virtue of this executive power being vested in the governor, all the subordinates were to act as

[24] Cf. Ford: "Politics and Administration," *Annals of the American Academy of Political and Social Science,* xvi, 184-187, and see Ch. VIII below.

[25] Thorpe, *Charters, Constitutions and Organic Laws,* p. 1893. On the distinction between a government of laws and one of men, see Aristotle, *Politics,* Bk. III, Ch. 16.

he directed and not by law." [26] The king in monarchical countries had been able to direct the administrative officers in individual instances, but the people as a mass, it was felt, could not do this. Therefore their control over the administrative officers must be exercised largely through elections and through the adoption of organic laws and the passage by their representatives of statutes to which alone such administrative officers should be accountable. Thus, as Woodrow Wilson puts it, "The appointment of officials was discredited among us; election everywhere took its place. We made no hierarchy of officials. We made laws—laws for the selectmen, laws for the sheriff, laws for the county commissioners, laws for the district attorney, laws for each official from the bailiff to governor—and bade the courts see to their enforcement; but we did not subordinate one official to another. No man was commanded from the capital as if he were the servant of officials rather than of the people. Authority was put into commission and distributed piece-meal; nowhere gathered or organized into a single commanding force. Oversight and concentration were omitted from the system. . . . We printed the SELF large and the *government* small in almost every administrative arrangement we made." [27]

The Anglo-Saxon principle of local self-government, made possible in England on account of her insular position and subsequently transplanted to our soil, has resulted in the largely decentralized type of administration in the American states. The doctrine and practice of legislative control and interference in administrative matters has tended to deprive the administration in the states of that independence from political control which is necessary to efficient action. Thus, the administrative system of the states is ground between the upper and nether millstones of legislative centralization

[26] *Debates and Proceedings,* pp. 169-170.

[27] "Democracy and Efficiency," *Atlantic Monthly,* lxxxvii, pp. 295-296.

and administrative decentralization. The excessive scope of legislative control over the administration at the expense of administrative control is also largely responsible for the disintegration of the administration and the lack of unity, coherence and concentration in its organization. For thereby the allegiance of each administrative officer is to the law and not to his administrative superior. Herein is seen also the influence of the doctrine of checks and balances operating within the executive department itself. The effects of the endeavor by the framers of the American Constitutions to prevent the government from becoming so strong and efficient in action as to endanger private rights and individual liberties are still observable in the present organization of the administration in the American states. Tendencies in the opposite direction have not yet developed far enough to eradicate this fundamental characteristic of the state administrative system.

The leading characteristics of the administrative system of the American states, noticed above, are sufficient to differentiate it from the systems both of the American National Government and from those of the leading European governments. The character of any particular administrative system is determined by its environment, that is, by the totality of the social, economic, and political forces and historical traditions which exert an influence upon it. The social necessity of administration legitimizes its existence, but also determines the extent of its province.[28] No administrative system is at any given time perfectly adapted to this environment, but is in a continual process of becoming more closely adapted to it. Thus, the character of an administrative system is always changing, more or less rapidly, in order to become better adapted to the ever-changing environment. The general type to which a particular system belongs, however, is

[28] Address of M. Cooreman before the First International Congress on the Administrative Sciences, *Rapports et Comptes Rendus du Congrès*, v, Part II, p. 9.

nevertheless capable of fairly accurate determination. The administrative organization will be bound to be more or less advanced in type, largely according to the importance and complexity of the functions performed by it. The administrative system found in the American National Government has diverged from the type found in the states, partly on account of the extent of the President's power of removal, partly on account of the greater scope and magnitude of the functions performed by the national government, and partly on account of the fewer direct points of contact between that government and the individual citizen. The principal European countries have developed an efficient type of administrative organization largely on account of the external pressure of powerful neighbors. With them, local self-government and private rights, however desirable theoretically, could not be allowed to stand in the way of national safety. In the case of an administrative system where no such external pressure exists, either because of geographical isolation or because the state is merely a subordinate part of a larger state, the administrative system need not be so highly or efficiently organized. The fact, therefore, that the American states are merely component parts of a larger state materially affects the character of their administrative systems. Thus, certain important functions, such as the carrying on of foreign relations and protection from foreign invasion, are taken care of by the national government to the practical exclusion of the states. Again, the subordinate position of the states has made local self-government and decentralization possible because a high degree of administrative efficiency has not been found necessary to state life. The functions to be performed by the state governments have hitherto been of relatively slight magnitude or complexity. But this condition is gradually changing, and, as it changes, the decentralized and disintegrated administrative system in the states is found to be more and more inadequate to meet the exigencies of the new

order. The administrative functions which modern conditions require that the American states shall undertake are of such increasing extent, variety and complexity that the states can scarcely afford longer to remain without a more unified, concentrated and efficient type of administrative organization.

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PART II

THE ORGANIZATION OF THE ADMINISTRATION

CHAPTER II

THE STATE GOVERNOR

Of the three principal American types of governmental executives,—president, governor, and mayor—the governor takes priority over the other types in two important respects. In the first place, the governor was the original form of executive found in America. The first holder of this office was Lord Delaware, of Virginia, who was made governor of that colony under the charter of 1609, ten years before the first representative assembly, nearly eighty years before the first city charter and one hundred and eighty years before the first president was inaugurated. The evolution of the office of governer has proceeded without serious interruption from that date to the present. In the second place, partly on account of its priority in time, the office of governor has played an important rôle in serving in part as a model for the formation of the other principal types of American executive authority. The present position of the state governor is a noteworthy example of the influence of past conditions and of the past state of public feeling upon the character of present political organization. In order, therefore, to render more intelligible the present organization of state executive power, it is desirable to consider briefly the office of the colonial governor.

The Colonial Governor.—The dependent condition of the American Colonies upon the Mother Country, prior to the Revolution, necessarily involved the exercise by the imperial government of certain forms of control over governmental organization and acts in the Colonies. This control is found

to some extent in connection with all three departments of colonial government (in so far as these were differentiated), but is especially noticeable in the case of the executive authority. The colonial governors were, for the most part, appointed by the English Crown either directly or indirectly through the proprietor,[1] and served during the pleasure of the king. Although Colonists were occasionally appointed to this position, it was natural under the circumstances that the appointees should more frequently be drawn from the class of men who had the ear of the king or of his favorites in England. The fact that the governor was usually chosen neither by the Colonists nor from among their number had, of course, an important bearing upon their attitude and feeling towards him. They were inclined to look upon him, particularly during the later colonial period, as an outsider not subject to their control, and to view with jealousy any extension of his power.

The popular distrust of the colonial executive was, in many instances, well founded. The inability or disinclination of many colonial governors to administer affairs from the standpoint of the best interests of the Colonies, as distinguished from those of the Mother Country, arose not only from the control over the appointment and tenure of the governor exercised by the imperial government, but also from the dual position which the governor occupied. Unlike the state governor of the present time, who seldom acts as the agent of any authority outside the state, the colonial governor found an important part of his duties to consist in acting as the agent in his colony of the Imperial Government. He was, for example, the principal medium of communication between the Colony and the home government, and it was his duty to see that imperial laws applying to the Colony were enforced, and that no law was enacted in the Colony which would be

[1] In Connecticut and Rhode Island and (during the seventeenth century) in Massachusetts Bay and Plymouth, the governors were elective.

in conflict with the laws, or injurious to the interests, of the Mother Country.[2] It was inevitable that, in the performance of his functions as agent of the imperial government and as head of the colonial government, apparently irreconcilable conflicts should sometimes arise between the interests of the two governments, which the governor, naturally in view of the circumstances of his position, would not infrequently decide in favor of the imperial government. The conflict of interest between the two governments was apparently accentuated through the rise of the elective assemblies, which on account of their origin were just as naturally inclined to side with the people of the Colony in any controversy with the governor or with the imperial government. It thus came about, particularly in the later colonial period, that, both actually and in the minds of the Colonists, the legislative assemblies represented their interests, while the governor, as a general rule, represented the conflicting desires and purposes of the imperial government. Legally, the governor was responsible not to the Colonists, but only to the English Crown and Courts.

The powers of the appointed governor, in both of the main aspects of his office, were largely determined by the provisions of the royal charters, commissions and instructions. His powers and duties were also sometimes defined by act of Parliament or even by act of the Colonial Assembly, provided such acts were not disallowed by the Crown and not in conflict with the Governor's Commission.[3] It appears that the governor also exercised a certain limited authority by analogy with the king's prerogative. "The vice-regal conception of the governor's office," says Greene, "determined not only the provisions of the royal Commission, but also supplied a rule of action in matters concerning which the Commission itself was silent."[4]

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[2] E. B. Greene, *The Provincial Governor,* Ch. IV.
[3] *Ibid.,* p. 97.
[4] *Ibid.,* p. 92.

The executive organs of government, particularly during the early period of colonial development, were not clearly differentiated from the legislative and judicial, and at no time was a sharp separation of powers effected. The governor was himself an important part of the legislative system. The governor's council, which, in addition to its function as an advisory body to the governor, acted as the upper house of the colonial legislature, was appointed by the Crown, usually on the recommendation of the governor. In the hands of the governor rested the important powers of summoning, proroguing and dissolving the assembly, and of recommending legislation, and over its acts he possessed an absolute veto. The governor also exercised directly a certain amount of legislative authority through his power to issue ordinances. With respect to the judiciary, the governor, with the advice of his council, sometimes erected courts of justice without legislative process. The appointment of judges and justices of the peace was generally vested in governor and council. Finally, the governor and council exercised direct judicial power in pardoning offenders and in hearing civil cases on appeal.[5]

As there was thus no clear differentiation of executive authority, so there was no definite location of administrative power. The governor was rather a political than an administrative officer. Administration was, of course, in a rudimentary stage of development, and only the more elementary and fundamental administrative powers, such as the preservation of peace and order, the administration of justice, the care of dependents, taxation and finance, and the building and maintenance of roads and bridges, were exercised by any authority within the colony. These powers were exercised either by the governor or by local officers, or by the colonial legislature, or directly by the Crown. The principal administrative powers exercised by the governor were the command

[5] E. B. Greene, *The Provincial Governor*, Ch. IV, p. 134.

of the colonial military force and the appointment and removal of military and certain civil officers, such as judges, justices of the peace and sheriffs. His appointment of military officers did not require confirmation, but in the appointment of civil officers he ordinarily acted with the advice and consent of council.

The control over the finances has always been recognized as such an important power that the authority which is able to exercise it is able largely to control the entire government and administration. It is interesting to note, therefore, that although the colonial governors at first exercised some control over this matter, they gradually lost it as it was absorbed by the colonial legislatures.[6] The struggle over the purse in the colonial governments reproduced on a smaller scale the historic contest between king and Commons in England, and the result in both cases was the same. The control of the funds gave the assembly an effective instrument of control over the governor. Although the governor commanded the militia, nevertheless his power in this respect was very small unless funds were forthcoming for its maintenance. Although he had legally the power of making appointments without consulting the lower house of the legislature, nevertheless in practice the wishes of the latter body had to be taken into consideration, for upon its action depended generally the appropriation for the salary of the governor's appointees, as well as that of the governor himself. From control over the supply of funds it was a short step for the legislature to assume the right to direct the manner in which such funds should be spent. In many of the colonies the Assembly also assumed the right to appoint financial officers, notably the provincial treasurers, and in this way acquired a more direct control over financial administration than would otherwise have been possible.

In contending against what he considered the aggressions

[6] P. L. Kaye, *The Colonial Executive Prior to the Restoration*, p. 65.

of the legislature, the governor had important weapons at his disposal. Through his power of dispensing patronage to the members of the legislature or their henchmen, he was sometimes able to secure such legislation as he desired. Through his power of absolute veto he was able to prevent the enactment of laws which he considered obnoxious, though this power was somewhat limited through the practice of the legislature in attaching riders to bills, particularly those carrying appropriations. Another powerful weapon in the hands of the governor was that of dissolving the assembly. Even the threat of dissolution was sometimes sufficient to bring a recalcitrant legislature to terms, for such action would render it necessary for the members to undergo the expense and uncertainty of securing their reëlection. Where the members, however, were certain of the support of the people, which was more frequently the case, a threat of dissolution naturally was less effective. Perhaps even more dangerous than the threat of dissolving a recalcitrant legislature was the failure to dissolve a subservient one, but this power was limited by the passage of triennial and septennial acts.[7]

With regard to the merits of the controversy between the colonial executive and the legislature, we are not particularly concerned. Theoretically, however, it may be said that the extent to which the legislature undertook to control the governor and to interfere in the exercise of administrative functions was inconsistent with the attainment of any large degree of administrative efficiency. Administrative efficiency, however, was not considered by the Colonists as by any means so important as popular control over the executive, and, in their view, such control could be best secured by enlarging the power of the representative body even to the extent of interfering with the executive in the exercise of powers which, theoretically, should belong strictly and solely to him. In the contest between the governor and the legislature, therefore,

[7] Greene, *Provincial Governor*, p. 155.

the people sided emphatically with the legislature; and the important point to notice is that, as a result of the contest, the people of the Colonies became embittered in general against the exercise of executive or one-man power. This fact has an important bearing upon the position of the governor under the constitutions which it became necessary for the American states to draw up after the Revolution.

The Governor Under the First State Constitutions.—The Revolutionary Constitutions were largely adaptations of the Colonial Charters to new conditions and were framed in the light of colonial experience. In drawing up these new instruments of government, the framers were also influenced to some extent by the prevalent theory of the separation of powers, or checks and balances, which many held to be the *sine qua non* of liberty. In pursuance of this principle, distributive clauses were placed in nearly all the first state constitutions. The framers, however, by no means carried the principle out to its logical conclusion in constructing the actual framework of government. They were, in fact, influenced more by conditions and experience than by theory.

In making provision for the executive department, the framers of the first state constitutions were influenced principally by the remembrance of executive tyranny in colonial times, and determined therefore that the executive department should be made so dependent that this danger would no longer exist. Since allegiance to Great Britain had been renounced, it became, of course, necessary to change the methods of selecting the state governor. Accordingly, in a few of the states, the governor was made elective by the people, but in the large majority of states he was made elective by the legislature. This provision alone would have revolutionized the position of the governor under the new constitutions. No longer was he responsible to the British Crown alone, but in so far as selection carries responsibility, he was now responsible to the people of the state, either directly or in-

directly through the representatives of the people in the legislature.

When it came to defining the powers of the governor, the change in his position and method of selection should logically have rendered it comparatively safe to intrust him with authority ample for the control of the executive department of the government and the state administration. But the conflicts between the colonial executives and legislatures had, as we have seen, embittered the men of that time against the exercise of executive authority. A habit of political thought, once definitely acquired, is not easily thrown off, even after the occasion for its existence has disappeared. Hence, in the Revolutionary Constitutions, the predominant legal position was assigned to the legislature, which was made the controlling and regulating force in the new state governments, while the executive was rendered weak and inefficient both in organization and function. As Madison succinctly expressed it in the Convention of 1787, "The executives of the states are in general little more than ciphers; the legislatures omnipotent." [8]

The concrete means whereby the governor, under the Revolutionary Constitutions, was brought to this dependent position, were, in addition to selection by the legislature in most of the states, mainly as follows: In Pennsylvania and one or two other states the governorship was virtually put into commission, as the nominal governor, or "president," as he was then sometimes called, was merely the presiding officer of a board or council, with which he shared the executive powers. Furthermore, in nearly all the states, there was an executive council, consisting of from three to twelve members who were chosen, not by the governor, but either by the legislature or the people. It had no special functions, but advised and checked the governor in the exercise of his executive powers. In a large majority of states the governor's term

[8] Elliot's *Debates*, v, 327.

of office was one year, and in no case was it longer than three years. Not only was his term short, but restrictions upon his reëlection were frequently placed in the organic laws. The governor had extremely scanty means of exercising any control over the administration. He could, it is true, in some states appoint a few administrative officers, but such appointments were in all cases subject to the approval of the executive council. In New York there was a "Council of Appointment," consisting of four state senators, elected by the assembly and presided over by the governor, which had the power of appointing practically all the administrative and judicial officers of the state, except a few who were appointed by the legislature or elected by the people. In most of the states, however, the large majority of the state administrative officers were elected by the legislature. Thus, an important power, which might have enabled the governor to control the state administration to a considerable extent, was very largely withheld from him and lodged in the legislature.

Not only was the legislature thus possessed of a large control over the administration, but its power over legislation was also increased and the power of the governor in this field was correspondingly curtailed. The autocratic character of the previous royal governorship was entirely shorn away. The Virginia Constitution of 1776 provided that the governor "shall not under any pretense exercise any power or prerogative by virtue of any law, statute or custom of England." In particular, the governor's powers of prorogation,[9] dissolution and absolute veto over the acts of the legislature were taken away from him. Some check over the legislature, however, was left in the hands of the governor under the Massachusetts Constitution of 1780, which gave the governor a qualified veto, subject to being overridden by a two-thirds vote of the legislature. In New York, in order to prevent

[9] In New York the governor might prorogue the legislature, but only for a period of sixty days in any one year.

hasty legislation, a "Council of revision" was provided, consisting of the "governor, the Chancellor, and the judges of the Supreme Court, or any two of them, together with the governor." [10] This body had the power of veto, but here again might be overridden by a two-thirds vote of both houses of the legislature.[11] It is of some significance that both these states of Massachusetts and New York, in which the governor retained at least a qualified veto power, were among the few states in which that officer was elected by popular vote. In those states where the governor was elected by the legislature, it would, of course, have been incongruous to allow the executive a veto over acts of the legislature. On the whole, the legislative power of the governor was negligible.

The governor retained his position as commander-in-chief of the military forces of the state, had nominally general supervision over the enforcement of the laws, and, to some extent, the power of pardon. The latter power was limited in most states, however, by various requirements, such as, that he must act only with consent of council, or not where otherwise directed by statute, nor with respect to certain crimes, nor in impeachment cases. The dependence of the governor upon the legislature was accentuated through the control which the latter body exercised over his salary. A few of the early constitutions provided, as in the Massachusetts Constitution of 1780, that he should have "an honorable stated salary, of a fixed and permanent value, established by standing laws," [12] but only in South Carolina was

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[10] *N. Y. Constitution of 1777,* Thorpe, p. 2628.

[11] The first constitution of Illinois, adopted in 1818, provided for a council of revision. It was constituted in much the same way as that of New York, but its veto might be overridden by a majority of the members elected to the two houses. See Thorpe, *Charters and Constitutions,* p. 978. A limited veto power was also vested in the governor or "president" of South Carolina under the short-lived Constitution of 1776. *Ibid.,* p. 3244.

[12] *Ibid.,* p. 1903.

the exact amount of his salary definitely fixed in the constitution and thus placed beyond the reach of the legislature for purposes either of bribery or of intimidation.[13] In view of the provisions in the first state constitutions, affecting the relations of the executive and the legislature, it appears that, "owing to the dependence of the executive upon the legislature both in respect to salaries and appointment (in many cases), the latter could quite easily absorb all administrative powers not expressly conferred upon the former, and could even seriously cripple the executive power in the exercise of those powers which were expressly conferred." [14]

Later Development of the Governor's Office.—The development of the office of governor since the adoption of the state constitutions of the Revolution may be roughly divided into two main periods, the first extending approximately to the middle of the nineteenth century, and the second from that date to the present time. During the first of these two periods, certain tendencies may be noted as having an influence on the position of the governor. In the first place, the election of the governor, which had at first in most states been vested in the legislature, was gradually shifted until he became everywhere elective by popular suffrage. He thus stood in this respect at least upon a plane of equality with the law-making body itself. In the second place, the legislature, which at the beginning of the period was practically omnipotent, not only legislatively but also administratively and in some states constitutionally, gradually declined in power. This decline of the legislature was due principally to the loss by the people of the complete confidence which they had originally possessed in that body as their immediate representatives. Sad experience had taught them that such confidence was often

[13] South Carolina Constitution of 1776. Thorpe, *Charters and Constitutions*, p. 3247.

[14] W. C. Webster, "State Constitutions of the Revolution," *Annals of the American Academy of Political and Social Science*, ix, p. 401.

misplaced, and specific cases of legislative corruption and extravagance emphasized the need of curtailing the great powers of the legislature and transferring some of them to another body. To some extent the governor benefited through this transfer, and there are evidences during this period of an increasing degree of confidence in the executive as compared with the legislature. The term of the governor was gradually increased from the one year to which it originally extended. In the new constitutions of this period and in amendments to the older, the powers and emoluments of the governor were less frequently left at the complete mercy of the legislature. In particular, the veto power was extended to him until he possessed this power in the majority of the states, and, at the same time, the fraction of the legislature necessary to overcome his veto was increased. For example, the New York Constitution of 1821 abolished the council of revision, transferred the veto power to the governor and required a two-thirds vote of the legislature to override it. The vetoes of President Jackson on the bank and internal improvement measures had rendered the veto power somewhat unpopular with the Whigs. Mr. Brown, in the Ohio Constitutional Convention of 1850, denounced it as a "one-man power derived from the prerogative of the British King."[15] But, on the whole, it probably met the approval of the majority of the people. The extravagance of state legislatures in voting appropriations and bond issues for internal improvements in excess of the resources of the state to meet them, frequently over the veto of the governor, brought a reaction.[16] As Mr. Hoffman expressed it in the New York Constitutional Convention of 1846, "he had heard of the expression often from men

[15] *Debates and Proceedings of the Ohio Constitutional Convention of 1850*, p. 89.

[16] See remarks of Mr. Peters in Illinois Constitutional Convention of 1847, *Illinois State Register* (Springfield), July 20, 1847, i, no. 18; and of Mr. Downs in the *Louisiana Constitutional Convention of 1845, Debates*, p. 302.

of every class, at the close of a legislative session, of thanks to God that the legislature had adjourned without doing any more mischief," and, with regard to the governor's veto power, he declared that it was popular because "it had been for the last half century a power exercised in direct vindication of the rights of the masses against monopoly, against privilege, against extravagance and debt." [17] As compared with the legislature, the relative power and dignity of the governor during this period increased.

If, during this period, the legislative power of the governor increased, his control of the state administration, except in Pennsylvania, where he had a considerable power of appointment, suffered, on the whole, a decline. This was perhaps due in some slight degree to a lingering animosity toward "one-man power" and towards the governor's office as savoring of monarchy—a relic of colonial times when the governor was appointed by the Crown. Moreover, in the new states of the Middle West, such as Ohio and Michigan, which had had territorial governments before becoming states, the situation of the colonies was to some extent reproduced. Just as the colonial governor had been appointed by higher outside authority in England, so the territorial governors of the new Western States had been appointed by a higher outside power in Washington, and their authority had frequently conflicted with that exercised by the territorial representatives of the people.[18] The result in both cases, when the new constitutions were framed, was the placing upon the governor of practically similar restrictions. Michigan, however, following the lead of Pennsylvania, gave the governor, under the constitution of 1835, a comparatively large power of appointment, but in 1850 this was withdrawn.

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[17] *Debates and Proceedings in the New York Constitutional Convention of 1846,* pp. 285-287.

[18] Cf. statement of Mr. Robertson in the *Ohio Constitutional Convention of 1850. Debates and Proceedings,* p. 91.

The decline in the governor's administrative powers, however, during the first half of the nineteenth century was due, in spite of the general dread of "one-man" power, not so much to special animosity towards the executive power itself, as to the widespread feeling that more powers of government should be lodged directly in the hands of the people. The downfall of the Federalists at the opening of the century and the rise of the Democratic-Republican party was one symptom of a movement which spread throughout the country and continued to grow, until it may almost be called a great democratic wave. In particular, the new states of the Middle West, formed as a result of the opening up and preëmption of new lands, became hot-beds of almost unadulterated democracy, both as to the forms of government set up and as to the actual rights enjoyed. The movement was accompanied by a sublime faith in the unlimited capacity of the people to perform almost any political function. One important manifestation of this democratic wave was the introduction of frequent popular elections of almost all public officials, legislative, executive, administrative and judicial. This power of the people to elect their officials received the loud lip-worship of demagogues, and the few public men, who, while maintaining that they were true democrats, had the courage to oppose the indiscriminate extension of the popular power of electing officials were denounced as "Federalists," as if the mere application to them of this epithet effectually disposed of all their arguments.

The widespread extension of at least nominal popular selection of public officers, while liberating the governor to some extent from the direct control of the legislature by taking from that body the selection of the governor himself and of the state administrative officers, at the same time greatly cut down the governor's appointing power, except in Pennsylvania, and, for a short time, in Michigan. This result may be illustrated in the case of New York, where, under the Constitu-

tion of 1777, the governor, in connection with the council of appointment, had power to appoint all other state officers except lieutenant-governor, state treasurer and subordinate judicial officers. Some doubt as to the power of nomination having arisen, by an amendment of 1801, this power was vested concurrently in each member of the council, including the governor.[19] By 1821 the number of officers, civil and military, whose appointment was vested in this council was approximately fifteen thousand, and the diffusion of responsibility for appointments among the members of the council injected political considerations and even corruption into the making of appointments to such an extent that, by the Constitution of 1821, the council of appointment was definitely abolished and the power of appointment transferred to other bodies. The principal executive officers of the state—the secretary of state, comptroller, treasurer, attorney-general, surveyor-general and commissary-general—were made appointive by joint action of the legislature. To the governor was given the appointment of judges, subject, however, to confirmation of his appointees by the Senate. By 1846, when New York again revised her constitution, the democratic wave was in full swing and both the principal executive officers of the state and also the judges were made elective by the people. Thus, the governor's power of appointment, and, in general, his power of control over the state administration had been gradually whittled away until by the middle of the century his power in this respect, not only in New York but in most of the other states, was at a very low ebb. Nor were his powers in other respects so great as to make him a very commanding figure. At this time the duties of the office in some of the less important states were considered so slight that it was not always thought necessary to elect to the position a man of more than ordinary competence, nor, at that time, was he usually required to reside continuously at the seat

[19] Thorpe, *Charters and Constitutions*, p. 2639.

of government. Of the governor of Ohio it was said in 1850, without apparently creating special wonderment, that, as the duties of the office did not require him to remain at the Capital much of the time, he "spent some of his time attending to his farming business and in making cheese." [20]

In the mid-century constitutional convention of Ohio, Mr. Clark thus sketched the position of governor: "The office of governor in this state is but nominal. . . . The law requires him to sign the commissions of officers, such as the justices of the peace and prosecuting attorneys. This requires but little labor and might be dispensed with by changing the law. He is to fill vacancies in certain offices until the legislature meets. He is to call special elections to fill vacancies in certain other cases. He seldom has occasion to do either, as vacancies rarely occur. Experience shows that an officer will generally hang on to an office as long as he can. Another duty of the governor is to issue his proclamation, giving notice of the Presidential election, and to attend here when the electors for President cast their vote. These are but trifling duties, and occur but once in four years. Another duty is to grant pardons. He is by law commander-in-chief of the militia and navy of this state. This is not an arduous duty. He spends no time with the militia, and as to the navy, he (Mr. C.) knows of none except the canal boats on the different ditches of this state, and he thinks the governor does not spend much time in attending to them. Another duty is to convene the legislature in urgent cases, and to adjourn it when the two houses cannot agree on a time of adjournment, neither of which often occurs. He is also required to demand fugitives from justice, and to deliver up such as flee to this state. To draw this state's portion of the public arms. To approve the bond given by the auditor of state. To discharge mortgages given to the state. To notify once in four years the

[20] *Debates and Proceedings of the Ohio Constitutional Convention of 1850*, p. 280.

assessors to take the census. To give notice of the sale of the canal lands, and appoint the appraisers. To appoint two directors of the Ohio and Pennsylvania Canal—to vote for directors on the state's interest in turnpike road and slack-water navigation companies, and appoint notaries public. All told, this is the sum of the governor's duties." [21] It would thus appear that by the middle of the century the governor had, except for his veto power, virtually arrived at the position of innocuous desuetude described by a member of the New York Constitutional Convention of 1846 as "a sort of nominal governor, standing disconnected with the business and interests of the state, with his arms folded, looking on like a sentinel." [22] The governor may be said to have been ground between the upper and nether millstones of the legislature, which largely made the law, and the judiciary, which was the principal agent of its execution.

A few words will suffice to indicate the general trend of the governor's position since the middle of the nineteenth century. During this period there has been a fairly steady rise in the power, prestige and influence of his position. This has been brought about partly through constitutional changes, partly through statutory enactments, and partly through extra-legal influences. Administratively, the governor's powers both of appointment and of removal have increased somewhat during this period. The great increase which has taken place in the extent and number of the functions undertaken by the states has necessitated the creation, either by constitution or statutes, of a large number of new offices and boards which were unknown during the earlier period. Some of these new officers and boards have been made elective by popular vote, but, partly through a decline in the public confidence in the efficacy of popular elections, and partly, doubtless, owing to

[21] *Debates and Proceedings of the Ohio Constitutional Convention of 1850,* pp. 279-280.

[22] *Debates and Proceedings,* p. 250. (Argus edition.)

the almost physical impossibility of placing on the elective ballot the names of all officers to be chosen, many of these officers and boards have been made appointive by the governor, subject, however, in nearly all cases, to the confirmation of the Senate. At the same time the governor's power of removal has increased to some extent, though it is still greatly inferior both to his own power of appointment and to the power of removal of the President of the United States. The governor's legislative power also, both legal and extra-legal, has shown a considerable expansion. His veto power, in particular, has, in several respects, been rendered more energetic and efficacious. Finally, he has acquired a positive initiative in legislation through his extra-legal influence. These points will be brought out more fully by a consideration of the present position of the governor.

Present Position of the Governor: Election, Term, and Compensation.—The tendency, already noted, to withdraw the selection of the governor from the legislature and transfer it to the people has now become complete, so that in every state the chief magistrate is elected by popular vote.[23] The qualifications required of those who cast their ballots for this officer are the same as those required of voters for members of the state legislature. The election of the governor, as well as of the other state officers who are elected on the same ballot, usually takes place at the same time as the election of members of the state legislature, and also of members of Congress and of the President of the United States. There is no inherent impropriety in the election of the governor at the same time with the state legislature because the issues involved are for the most part the same and the governor is, in part, a political officer. If the governor were merely an administrative officer with ministerial powers, he should not be elected by popular vote at all, but, if so elected, the elec-

[23] This election is direct in all the states except Mississippi, where it is indirect.

tion should be quite separate from that for members of the political department of the government. The effect of electing the governor at the same time with members of the state legislature is usually that the governor and legislature are of the same political complexion. This, however, is not always the case, for, in Massachusetts, the governor has for several terms been a Democrat, while the majority of the legislature were of the opposite political party. In the case of the election of the President and national legislature, however, the issues involved are generally quite different, and the merging of state and national elections into one is apt to cause a confusion of the public mind which would tend to prevent an effective popular control. Governors have sometimes been elected, not so much on their own merits or on the merits of the policies which they advocated, as because they were members of the political party which, for the time being, was dominant in national affairs. The merging of the state and national elections tends to strengthen party control and to facilitate straight party voting. Previous to the Civil War, when states' rights were more jealously guarded than at present, the merging of state and national elections was opposed on the ground that it militated against the dignity of the state and would cause the public mind to become engrossed with national issues, to the exclusion of state affairs.[24] In spite of these objections, however, considerations regarding the expense of holding separate elections and the abuses connected with too frequent elections have induced most of the states, as already noted, to hold them at the same time.

In most of the states a majority of all the votes cast at the election is not required to elect the governor, but a plurality of the votes is sufficient. A governor may thus sometimes be elected by a minority of the voters, and so the fundamental principle of majority rule may be violated. But the only al-

[24] See speech of Mr. Buchanan in the *Maryland Constitutional Convention of 1851, Debates and Proceedings,* ii, p. 213.

ternatives would seem to be to limit by law the number of candidates to two persons, to hold another election for the two highest candidates, or to throw the election into the hands of another body. The last-named course is followed in the few states which still require that the successful candidate shall have a majority of the total vote. If no candidate has a majority in these states, the legislature in joint ballot elects the governor. In the other states, the constitutions usually provide that if the two candidates having the highest vote are tied, the legislature, by joint ballot, shall choose one of them for governor.[25] Contested elections for governor are also usually determined by the legislature on joint ballot, but, in some states, a special canvassing board, composed of certain state officers, is constituted for this purpose. In Pennsylvania, the chief justice of the state Supreme Court presides upon the trial of contested elections for governor and decides questions regarding the admissibility of evidence.[26] This arrangement carries with it a possible danger of dragging the chief justice into politics, but has the advantage of giving a judicial appearance to a trial which would not be apt to be decided without regard to political considerations unless the trial body happened, by a fortunate accident, to be composed of members politically favorable to the proper side of the question at issue.[27]

Legal qualifications for the office of governor are generally laid down in the state constitutions. In a few states he need possess only the qualifications of an elector, but in most states additional requirements are made, such as that he shall have attained a certain age, usually thirty years; that he shall have been a citizen of the United States for a certain number of years, varying from two to twenty; and shall have been a

[25] See, for example, Illinois Constitution, Art. V, Sect. 4.

[26] Pennsylvania Constitution, Art. IV, Sect. 17.

[27] See speech of Mr. Buckalew, author of this provision, in the *Pennsylvania Constitutional Convention of 1873, Debates*, v, pp. 238-239.

resident of the state in which he is elected for a number of years, usually five. During the period when the native American party had some influence, there was considerable agitation in favor of the requirement that the governor should be a native-born citizen of the United States, thus bringing this provision into conformity with the corresponding provision of the Constitution of the United States in regard to the president. But this agitation has now almost entirely subsided.

The placing in the constitutions of qualifications for the chief executive office in excess of those required of voters or of holders of other offices is an indication of the thought in the mind of the constituent body that the office is, or at least should be, one of some dignity. The object and effect, however, of requiring such qualifications as age, residence and citizenship is not only to secure in the gubernatorial chair a man of experience and knowledge of the conditions with which he will have to deal, but also to enable the people of the state the better to know him and to become acquainted with his suitability for the office, and thus to exercise a more intelligent choice in his selection. The placing in the constitution, however, of qualifications for the governor's office is legally a self-imposed limitation upon the power of the people to elect whom they will. Nevertheless, such constitutional limitations are not likely often to be of much practical importance, for, even though such qualifications were not required by the constitution, persons not possessing them would seldom be elected. In practice, it is ordinarily necessary that a man's name should have come prominently and favorably to the notice of the people in connection with the holding of some other public office before he would be considered suitable gubernatorial timber. Several cases, for example, have occurred, such as those of Governors Deneen, of Illinois, and Folk, of Missouri, where a governor had previously made for himself a reputation for ability and integrity in the office of local prosecuting attorney in one of the populous subdivisions of the state. Ex-

ceptional cases sometimes occur, however, as in that of President Wilson when he was elected governor of New Jersey, where the incumbent had not previously held any public office.

The governor's term of office has, as we have seen, been gradually increased. The reason for this development was noted as early as 1821 in the New York Constitutional Convention of that year. "At first," said Mr. Sutherland, "in the old states, from the recollection of Colonial vassalage, the constitutions limited the term of governors to a short time. The apprehensions, however, entertained of encroachments from this branch have been found unreal, and consequently in the new states, and more recent constitutions, the term of the governors has been lengthened." [28] At present, in twenty-three of the forty-eight states, the governor's term is four years in length; in twenty-three others it is two years, while in the remaining two states, New Jersey and Massachusetts, it is three years and one year, respectively. In Massachusetts, however, it is customary to reëlect a governor for three successive terms, so that, for practical purposes, he may be said to be elected for a three-year term, subject to the possibility of recall at two stated intervals during his term. Although the states are thus equally divided between the two-year and the four-year period, the present tendency, as noted in the recent constitutions of Alabama, Virginia, Oklahoma, and New Mexico, is towards the longer period. The old idea of rotation, or of handing around the office, is thus gradually giving away to the principle that the governor should have a term long enough for him to learn thoroughly the duties of his office and for the state to reap the advantages of his experience.

Upon the same principle is based the gradual disappearance of provisions rendering the governor ineligible to succeed himself, though restrictions upon reëligibility are still found in

[28] *Proceedings and Debates of the New York Constitutional Convention of 1821*, p. 140.

a few states. For example, the Constitution of Pennsylvania, adopted in 1873, provides that the governor "shall not be eligible to the office for the next succeeding term." [29] The disappearance of these provisions is coupled with an actual tendency towards reëlection, especially in the states having the shorter terms. There are, however, some states, such as Maryland, where, although no legal restriction on reëligibility exists, a governor is seldom renominated, and almost never reelected. This is probably due, in part at least, to the character of his appointments, which have rendered him either inacceptable to the party organization or else a weak candidate before the voters. The restrictions upon reëligibility were originally placed in the constitutions on account of the fear that otherwise the governor might, soon after his inauguration, begin to scheme and electioneer, to form log-rolling combinations of interests and make appointments favorable to the political powers, in order to pave the way for his reëlection. These schemes, it was feared, would so distract his attention as to divert it from the proper consideration of his legitimate official duties.[30] Undoubtedly there was and is some force to this view, but, on the other hand, it may be urged that, when the governor is rendered ineligible to succeed himself, one of the principal incentives to perform his duties in an able and acceptable manner is taken away from him. Furthermore, the people of a state ought not to be deprived of the services of one who has proved himself to be an able, experienced and courageous governor, even though he has just had one or two terms in the office. The question really depends for its solution upon the further question as to whether the manner of electing the governor is such as to secure a real choice by the people, or whether in reality his nomination and election are dictated by political managers or powers unfriendly to the

[29] Art. IV, Sect. 3.

[30] See speech of Mr. Medill in the *Illinois Constitutional Convention of 1870, Debates and Proceedings,* i, p. 756.

public interests. In the former case, there is little practical need for restrictions on reëligibility.

The same considerations which brought about the placing of restrictions upon reëligibility also caused the insertion of provisions disabling the governor from serving in any other state or Federal office during the term for which he is elected. Such provisions are still found in a number of state constitutions. The courts, however, have held that such a provision does not prevent the governor from serving *ex officio* as a member of a state board, such as a state board of control,[31] or a state board of public works.[32]

The salary of the governor varies from $2,500 in Vermont and Nebraska to $12,000 in Illinois, and in a number of states he is also furnished with a residence at the state capital. A committee of the New York Constitutional Convention of 1915 has proposed that the governor's salary in that state be raised to $20,000, but at present his salary of $10,000 is less than that received by the judges of the highest state court or by the mayor of New York City. In the early history of the states, as we have seen, the amount of the governor's salary was left to the determination of the legislature, and the latter body sometimes threatened to, and occasionally did, use this power either for the purpose of bribery or of intimidation. In the later revisions of state constitutions, the amount of the governor's salary frequently was definitely fixed in that instrument in order to make him more independent of legislative control. That the governor should be independent of the legislature in this respect, there can be little question, but the policy of definitely fixing the amount in the constitution is open to question. The amount having once been fixed in the constitution is not easily changed, even though it may have become manifestly inadequate, through the increased supply of gold and other causes which

[31] State *vs.* Potterfield, 47 S. C. 75 (1896).

[32] Bridges *vs.* Shallcross, 6 W. Va. 562 (1873).

contribute to the increased cost of living. If this is the case, the governor may have to serve at a financial sacrifice, or else the constitutional provisions may be disregarded. The Illinois Constitution of 1848 provided that the governor should receive a salary of $1,500 per annum, which should not be increased or diminished, while judges of the Supreme Court were allowed a paltry $1,200.[33] Before 1870, when the next revision of the Illinois Constitution took place, these salaries were found to be so insufficient that the legislature raised the compensation of these officers and all three departments of the government connived at this violation of the Constitution.[34] In view of the difficulties thus disclosed, most of the states now leave the exact amount of the governor's salary to legislative discretion, but provide in the constitution that the amount shall not be increased nor diminished during his continuance in office. To this provision is also often added the further provision that the governor shall not receive to his own use any fees, perquisites or other compensation.[35]

The office of governor may become vacant during the term of an incumbent in various ways, such as through impeachment by the legislature, recall by the voters, absence from the state,[36] or other disability. Cases might occur where the disability of the governor would be a matter of doubt, such as in cases of alleged insanity of a mild sort, but no special method is provided in the constitutions for the determination of such a question. Such a question, however, could doubtless be determined by the proper court, upon a writ of *quo warranto,* when the person, designated by law as the governor's successor in case of disability, should attempt to take possession of the office. This method, however, would prob-

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[33] Illinois Constitution 1848, Art. IV, Sect. 5.

[34] *Debates and Proceedings of the Illinois Constitutional Convention of 1870,* i, pp. 804-808.

[35] See, for example, Illinois Constitution, Art. V, Sect. 23.

[36] State *ex rel.* Warmoth *vs.* Graham, 26 La. Ann. 568 (1874).

ably not prove to be the most expeditious method of settling the matter. There was formerly some sentiment in favor of electing the governor's successor by popular vote, particularly if the vacancy should occur during the first part of his term,[37] but, at present, this procedure is followed only in case of the recall.[38] In other cases of a vacancy in the governor's office, a particular officer is designated by the constitution or statute as his successor to fill out the remainder of the unexpired term. In most states this officer is the lieutenant-governor, and, if the latter officer should in turn become incapacitated, the president of the senate and speaker of the house usually succeed in order. These officers usually succeed immediately after the governor in those states where there is no lieutenant-governor. In cases of impeachment, the succeeding officer begins to act as governor when the house of representatives brings in the original bill of accusation, and, if the impeachment is successful before the senate, he continues for the remainder of the term.[39]

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[37] See *Debates and Proceedings of the Kentucky Constitutional Convention of 1849,* p. 730.

[38] See below, Ch. VIII.

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CHAPTER III

THE GOVERNOR'S LEGISLATIVE POWERS

Powers of the Governor in General.—Although the governor is nominally the chief executive authority in the state government, he nevertheless participates in both of the two main functions of government, viz., the formulation and the execution of public policy, and, as will be seen later, his influence in connection with the former function is frequently of even greater importance than with the latter. The laying down of general rules and the determination of broad general questions of public policy rests, in legal contemplation, primarily with the legislative body, within the limits of the Constitution. As a matter of practical politics, however, and, to some extent, even through legal recognition, the governor frequently influences, to a considerable extent, the formulation of public policies. On account of the wide scope of legislative authority over the regulation of the administration, the executive authority must have some share in the exercise of legislative power, if it is to have laws which it can execute sympathetically. A proper coördination of the making and the execution of law thus requires that the executive authority should have some influence over the law-making process. Such sharing of legislative power by the executive authority constitutes, strictly speaking, a departure from the principle of separation of powers. It was, indeed, formerly opposed for that reason. "The legislative power," said Mr. Washburn in the Illinois Constitutional Convention of 1870, "the power to inaugurate and mature the policy of the state belongs exclusively to the general assembly. It would be a

usurpation by the governor to exercise that power. The duty of the governor is to execute the policy, not to say what the policy shall be."[1] This view, however, is no longer very widely held, and, certainly, the principle upon which it is based is often disregarded. Legally, however, the powers of the governor, whether in determining or in executing policy, are quite strictly construed by the courts. While the legislature, as already noted, is largely a body of general and residuary powers, those of the chief executive are confined to such as are granted, either expressly or by necessary implication, in the constitutions or statutes. Even the doctrine of necessary implication must be applied with caution. As a general rule, therefore, the governor has little, if any, inherent or prerogative powers.[2]

Although we are primarily concerned with the execution rather than with the formulation of public policies, nevertheless these two functions are so closely connected and the interaction between them is so constant and all-pervading that we cannot profitably consider one without some reference to the other. We are not at this time concerned, however, with all the processes of legislation nor with the purely judicial side of administration, but only with executive administration and with that side of legislation which affects, or is affected by, executive authorities. Although, for practical purposes, law is sometimes made at the time of, and in the very act of, its execution, yet, in general, it is true that the law must first be made and known before it can be executed. We will therefore consider the legislative powers of the governor before taking up his control over the execution of the law.

Legislative Powers of the Governor.—The influence or control which the governor wields over the formulation of public policy may be considered under two main heads, viz.: that

[1] *Debates and Proceedings*, i, p. 759. (Italics are the author's.)
[2] Richardson *vs.* Young, 122 Tenn., 471 (1910).

which is legal, and that which is extra-legal. The legal side of his legislative powers may in turn be divided into three classes, viz.: first, power over the organization and sessions of the legislative body proper; secondly, power of coöperation with the legislature as a component part of the regular law-making power; and, thirdly, power of subsidiary legislation in pursuance of, or supplemental to, previously existing constitutional or statutory provisions.

The control exercised by the governor over the organization of the legislature is very slight. It has been suggested that, in case of a contest between two bodies, each claiming to be the legally elected legislature, the governor may determine the question of legality by recognizing one of these bodies and participating with it in legislation. But the governor probably does not possess such a power.[3] A member of the legislature who resigns usually sends his resignation to the governor, and, where a vacancy in the membership of the legislature occurs in this or in some other way, the governor in most states possesses the power or duty of issuing a writ commanding the proper officials to hold a special election to fill the vacancy.

The governor has no control over the time for beginning a regular legislative session, as this is determined by the constitution, nor over the time of adjournment of either a regular or special session, unless there is a disagreement between the two houses. In parliamentary law, the term "disagreement" denotes an *impasse* reached by the two houses through successive unsuccessful attempts at agreement. If such a disagreement exists, the fact is brought to the governor's attention by an official certificate from the presiding officer of one or both houses to that effect, or else he takes cognizance of the fact without formal notification and adjourns the two houses to such time as he thinks proper, not beyond the first

[3] J. D. Barnett, "The Executive Control of the Legislature," 41 *American Law Review*, 236.

day of the next regular session.[4] In a number of states, the governor may on extraordinary occasions, such as in time of disease or uprising, convene the legislature at some place other than the seat of government provided it is not outside the state nor almost wholly inaccessible. Although the reason for taking such action is usually specified in the constitution, nevertheless the governor is the final judge as to whether the emergency exists which justifies his action. This power may, as a rule, however, be exercised by the governor only during the recess of the legislature, for, if the latter body is in session, it may itself take appropriate action in such an emergency.[5] It is seldom, however, that an occasion arises for the exercise by the governor of his power either of adjournment of the legislature, or of changing the place of its sessions.

Of more importance is the governor's power of convening the legislature in special session on extraordinary occasions. In some states he may also convene the senate alone in special session for the confirmation of appointments. The final determination of the necessity for a special session rests with the governor, and even though he might be mistaken in his judgment that extraordinary circumstances rendered it desirable that the legislature should be called in special session, nevertheless this would not have the effect of invalidating the laws enacted at such session. In the Virginias the governor is required by the constitution to call a special session when requested to do so by a certain extraordinary majority of the members of the legislature, but it is doubtful whether he could legally be compelled to act in accordance with this provision.[6]

[4] See Illinois Constitution, Art. V, Sect. 9; People *vs.* Hatch, 33 Ill., 9 (1863); and *Debates and Proceedings of the Illinois Constitutional Convention of 1870*, i, p. 776.

[5] Taylor *vs.* Beckham, 108 Ky. 278 (1900).

[6] Constitution of Virginia, Art. V, Sect. 73; Constitution of West Virginia, Art. VI, Sect. 19.

The governor convenes the legislature in special session through the issuance of a proclamation, in which he is usually required to state the purposes for which the legislature is called together. The importance of this function from the standpoint of the governor's control over legislation is that, in about half the states, the legislation at such session is limited to such matters as the governor includes in his call, or submits to the legislature after its organization. Even in these states, however, there are certain general limitations upon the governor's control of the action of the legislature in special session. In the first place, the restriction upon the action of the legislature is confined to legislative acts, and does not apply to acts which are executive or judicial in character, such as confirmation of appointments and impeachment. Naturally, it is hardly to be expected that a governor would recommend his own impeachment, yet Governor Sulzer of New York was impeached at a special session of the legislature in spite of the constitutional prohibition that "at extraordinary sessions no subject shall be acted upon, except such as the governor may recommend for consideration."[7] The Supreme Court of New York upheld the impeachment on the ground that the exercise of the power of impeachment is a judicial and not a legislative act.[8] In the second place, the governor cannot control the details of legislation, but only the general subjects or topics. It remains within legislative discretion to select the detailed means whereby such subjects may be provided for. Furthermore, in some states, as in Alabama, the legislature may, by extraordinary majority vote, legislate upon subjects other than those designated in the proclamation of the governor.[9] Again, after issuing his proclamation and therein limiting the legislature to certain subjects of legislation, the governor himself cannot, as a general rule, subse-

[7] Constitution of New York, Art. IV, Sect. 4.
[8] People *ex rel.* Robin *vs.* Hayes, 143 N. Y. Supp., 325 (1913).
[9] Constitution of Alabama, Art. IV, Sect. 76.

quently broaden the scope of legislation by approving bills relating to subjects other than those included in his original call. The governor of Illinois called a special session in 1911, enumerating certain subjects for legislative consideration. Subsequently, while this session was still in existence, other matters came up requiring legislative action, and the governor thereupon called another special session for their consideration, so that there were two simultaneous special sessions. In order to avoid resort to such an evasion of the constitution, it would be better to provide in that instrument, as is done in Florida, Mississippi, Montana, Nevada and Utah, that the legislature shall be limited to action upon matters contained in the governor's call, or submitted by him during the session. Since the tendency in recent years has been to decrease the frequency of regular legislative sessions, the need and frequency of special sessions has been on the increase. This development has strengthened the control and leadership of the governor in legislation, for in a special session there is less opportunity for evading responsibility for the enactment of needed legislation. The attention both of the legislature and of the public is concentrated to a greater extent upon the subjects brought forward by the governor.

The governor's legal powers of participation in law-making are exercised principally through the sending of messages and recommendations to the legislative body proper, at either a regular or special session, and through the approval and veto of its acts. Although the governor may be considered as a component part of the law-making power, nevertheless, in deference to the doctrine of separation of powers, he is not accorded a seat upon the floor of the legislature, nor is it customary for him to address that body in person. In submitting his views on public questions to the legislative body as a whole, he is therefore confined to the submission of messages and recommendations in writing. This he is required to do at the opening of legislative sessions, and in some states also

at the end of his term. He may, in addition, send special messages at any time during the session. In these messages, both regular and special, he gives the legislature "information as to the condition of the state, and recommends such measures as he shall deem expedient." [10] The term "measures," as here used, does not legally preclude the governor from submitting his recommendations in the form of completely drafted bills.[11] This, however, is almost never done, for, however beneficial such a practice might be upon the character of the legislative product, it would probably be denounced as a violation of the principle of separation of powers, and as an encroachment upon the legitimate functions of the legislative body proper, and would therefore cause needless friction between the legislative and executive departments of the government. In Alabama, however, the governor, acting jointly with the state auditor and attorney-general, is required, before each regular session of the legislature, to prepare a general revenue bill and submit it to the legislature for its information.[12] The message of the governor at the opening of regular sessions usually gives prominence to a statement of the financial condition of the state. In a number of states, including Illinois, Missouri, Nebraska and Texas, he is specifically required to accompany his message with a statement of all moneys received and paid out by him from any funds subject to his order, and, at the commencement of each regular session, to present estimates of the amount of money required to be raised by taxation for all purposes.[13] In some of these states, however, it should be added, this mandate is seldom fully complied with. In order to increase the governor's influence over

[10] Constitution of Illinois, Art. V, Sect. 7.

[11] Address of Governor Woodrow Wilson of New Jersey before the House of Governors, Frankfort, Kentucky, November 29, 1910.

[12] Constitution of Alabama, Art. IV, Sect. 70.

[13] Constitution of Illinois, Art. V, Sect. 7. A Vermont act of 1915, No. 26, creates a committee on the budget, composed of governor and state officers.

financial legislation, it might be well to broaden this provision so as to authorize the governor specifically to transmit to the legislature a statement both of anticipated revenues and of appropriations recommended by the executive for all purposes. In any case, however, such recommendations of whatever character have legally no binding force upon the legislature, and are therefore merely advisory. They do not impair the power of the legislature to make appropriations.[14]

In a few special cases, the governor is able, through the exercise of his message power, to interpose more directly in the actual process of legislation. In New York, for example, the governor, by special emergency message, may dispense with the constitutional requirement that all bills shall be printed and upon the desks of members at least three days before final passage.[15] The governor of Nebraska may, by special message, dispense with the constitutional requirement that no bills, except general appropriation bills, may be introduced after the expiration of the first twenty days of the legislative session.[16] In Maryland the legislature is prohibited to pass local and special laws in certain cases unless recommended by the governor or officers of the treasury department.[17]

The action of the governor as a component part of the law-making power at the final stage of the legislative process is definitely provided for in all states except North Carolina through the requirement that every bill which has passed the two branches of the legislative body proper must be submitted to the governor for his approval or disapproval. In some states resolutions also must be submitted to the governor, but this does not include such resolutions as those relating to adjourn-

[14] *In re* Opinion of Justices (Mass., 1911), 94 N. E., 852. The governor is authorized to prepare budget in Minnesota (Laws 1915, Ch. 356) and Nebraska (Laws, 1915, Ch. 229).

[15] Constitution of New York, Art. III, Sect. 15. The constitutional convention of 1915 proposed to abolish this power.

[16] Constitution of Nebraska, Art. III, Sect. 4.

[17] Constitution of Maryland, Art. III, Sect. 33.

ment or rules of procedure, to constitutional amendments or measures submitted to popular referendum, which do not, as a rule, go to the governor. The time allowed the governor while the legislature is in session, to consider a bill before taking action upon it, varies from three to ten days. If the governor fails to take action upon the bill within the specified period, it becomes a law, unless the legislature previously adjourns, in which case the governor may usually either approve the bill or exercise what is known as his "pocket veto." The period allowed the governor for consideration of measures after adjournment tends to be longer than that allowed while the legislature is in session, and, in view of the great mass of legislation usually left over at the end of the session and the great responsibility for the careful sifting of measures thus placed on the shoulders of the governor, the period allowed him for consideration after adjournment should be still further lengthened. In New York and California no bill becomes a law after the final adjournment of the legislature unless approved by the governor within thirty days after such adjournment.[18] In a number of other states, including Illinois and Pennsylvania, the governor may, for a specified period after the adjournment of the legislature, prevent a bill from becoming a law by filing it with his objections in the office of the secretary of state.[19] The power of the governor to veto bills after the adjournment and even during the last few days of the legislative session is especially important, as it then becomes practically impossible to repass the measure over his veto. It is frequently the custom in legislative bodies to rush through important measures, particularly appropriation bills, during the last few days of the session, and over these measures the governor is therefore able to exercise what is virtually an absolute veto. Indeed, to such an extent has this tendency some-

[18] Constitution of New York, Art. IV, Sect. 9; Constitution of California, Art. IV, Sect. 16.

[19] Constitution of Illinois, Art. V, Sect. 16.

times gone that the real work of legislation may be said to begin after the adjournment of the legislature.[20]

In the national government the veto power of the president has sometimes been crippled through the attachment by Congress of "riders" or extraneous matter to appropriation bills. Profiting from this experience, as well as from similar practices in the states themselves, thirty-four states now allow the governor to veto items in appropriation bills, and three of these also allow him specifically to disapprove sections of any bill.[21] In many states, however, having no specific grant of power to the governor to veto parts of bills other than appropriation bills, the same result is frequently reached through the operation of the provision generally found in state constitutions that no bill, except general appropriation bills, shall embrace more than one subject, which shall be plainly expressed in the title.[22] The term "item," however, is narrower than the term "subject," and embraces any part of a bill which is sufficiently distinct that it may be separated without serious damage to the essential force of the residue. The power of the governor to veto items of appropriation bills is of especial importance as giving him considerable influence, not only over legislation, but also over the entire range of state administration. This power would obviously be much increased if the governor were able not only to veto an item but also to reduce the amount of a specific appropriation. The governor may approve the object of an appropriation but consider that the amount is out of proportion to the requirements of the case, or beyond the prudent use of the public funds. Under these circumstances he is nevertheless forced either to approve

[20] P. S. Reinsch, *American Legislatures and Legislative Methods,* p. 284.

[21] South Carolina, Washington and Virginia.

[22] Cf. Joseph Barthélemy, *Le Rôle du Pouvoir Exécutif dans les Républiques Modernes,* p. 70; and remarks of Mr. Barbour in *Virginia Constitutional Convention of 1901-2, Proceedings and Debates,* ii, p. 1875.

or disapprove the whole amount. In Pennsylvania, however, although there is no express constitutional authorization, the Supreme Court has held that the governor may veto part of a specific appropriation, and the governors of that state have frequently availed themselves of this power.[23] The power of reducing items has also been exercised, without express authorization, by the governors of Illinois, Oklahoma, Idaho, Maryland, and other states. In Illinois and Oklahoma, however, this practice has recently been checked by decisions of the supreme courts of those states.[24] In the Illinois case, it was held that "the power of the governor to veto any distinct item or section in an appropriation bill does not give him the power to disapprove of a part of a distinct item and approve the remainder, and if he vetoes part of an item by striking out the words 'per annum,' or by approving a part of the amount of one item and disapproving the remainder, his action is void and the whole item remains in force as passed by the legislature." It is probable, however, that the governor could accomplish a result equivalent to the reduction of items by refusing to approve vouchers for expenditures beyond what he thinks proper. He could not be compelled to approve them by mandamus, for, in the exercise of his power to approve vouchers for the payment of public moneys, the governor acts in an executive capacity, involving both judgment and discretion.

Governors throughout the country are exercising the power of vetoing items of appropriation bills with increasing frequency, and the number of occasions arising where the action of the legislature renders the exercise of this power necessary or desirable is also on the increase. Legislatures have

[23] Commonwealth *vs.* Barnett, 199 Pa. St., 161 (1901).

[24] Fergus *vs.* Russel, 270 Ill., 304 (1915); Regents of the University of Oklahoma *vs.* Pratt, 28 Okla., 83 (1911); for discussion of the Illinois case see also *Report of the Attorney-General of Illinois,* 1912, p. 1038.

sometimes, either by inadvertence or design, placed the governor in an awkward and embarrassing position by adjourning after making appropriations largely in excess of the anticipated revenues or of what the state treasury will bear. In order to preserve the financial integrity of the state and avoid a deficit, the governor is then forced to reduce the total amount of the appropriations, though knowing that by so doing he will incur the displeasure and criticism of the persons, institutions, or interests who would otherwise benefit thereby. Through the exercise of their power to veto items the governors of New York, Pennsylvania and Illinois have recently pared off millions of dollars from the general appropriation bills.

A power somewhat similar to that of vetoing parts of bills, but one that associates the governor even more intimately in the actual process of legislation, is that conferred on him by the constitutions of Virginia and Alabama, whereby he may propose the amendment of a bill with respect to any feature which he disapproves, and the proposal of the governor must be considered by the legislature before final action on the bill. The object of this provision is to prevent needless friction between the executive and the legislature which may occur if the veto power is held as a club over the heads of the legislature. It is based upon the salutary principle that the governor and the legislature should coöperate in the actual process of legislation so as to enact laws representing their combined wisdom and views. In a word, it facilitates conference and agreement between the governor and the legislature.[25] Governors could doubtless exercise this power of suggestion in the absence of such a constitutional provision, but the presence of the provision gives greater authority to the governor's action, and disarms any criticism of executive usurpation which might otherwise sometimes be made.

[25] See *Proceedings and Debates of the Virginia Constitutional Convention of 1901-2*, i, pp. 1027, 1050.

Except after adjournment of the legislature, the governor's veto is not absolute, nor is it arbitrary in character, for he is uniformly required, when disapproving a bill, to return it to the house in which it originated with a statement of his objections to it. This provision is designed both to hold the governor to some accountability for his acts and also to afford the legislature the benefit of the governor's views when they come to reconsider the measure. It is not always necessary, however, that he should specifically object to each bill separately, for in some states, such as New York, it is customary for the governor to group in an "omnibus veto" a number of measures which he disapproves. No definite limit is set upon the character of the reasons which the governor may assign for a veto, and they may relate either to the unconstitutionality or the inexpediency of the proposed measure. There would seem to be some doubt, however, as to the propriety of assigning reasons for the veto which do not pertain to the merits of the bill itself. Nevertheless, governors have occasionally vetoed measures solely on the ground that large sums of money have been spent in promoting their passage.[26]

The action of the legislature, upon the return to it of a vetoed measure, is subject to certain restrictions which are designed both to secure due consideration for the governor's objections and to place upon the members of the legislature a proper sense of responsibility for their votes. In New Jersey no action can be taken by the legislature upon the same day on which the vetoed measure is returned. In nearly all the states the governor's objections must be entered at large upon the journal of each house, and in most states the vote on repassage must be by yeas and nays and the names of the members voting for or against the repassage of the bill must

[26] See J. H. Benton, Jr.: *The Veto Power in the United States* (Boston, 1888), pp. 1-10.

also be entered upon the journals.[27] The most important restriction upon legislative action, however, is the requirement in most states of an extraordinary majority vote for repassage over the governor's veto. Thirty-four states follow the Federal Constitution in requiring a two-thirds vote, while in five others a three-fifths vote is specified. In the remaining eight states a mere majority vote is sufficient. In taking the vote some states require merely the specified majority of the members *present*. Even a vote of two-thirds of the members present might, in many instances, be less than a majority of all the members elected, and, under this provision, a bill might be repassed over the governor's veto by a smaller vote than it received in the first instance. This is the case in Connecticut, which requires merely a majority of the members present and has the weakest veto to be found in any of the states. The better and more usual practice is to require a specified majority of the members elected to each house in order to override the governor's veto.[28] The natural pride of opinion of the members of the legislature will tend to induce them to repass a vetoed bill by about the same vote as in the first instance. The mere fact, however, that a bill requires for its original passage a majority equal to that necessary for its repassage over the veto does not absolve the legislature from the necessity of repassing it, if it is to become a law,[29] for a sufficient number of votes may be, and sometimes

[27] See *The Veto Power in the Several States,* Bulletin No. I of the Rhode Island Legislative Reference Bureau.

[28] Other methods which have been suggested from time to time for dealing with the executive veto in legislation include proposals to refer the matter to the people so that a vetoed bill shall not become a law unless ratified by popular vote at the next general election (*Debates and Proceedings of the Ohio Constitutional Convention of 1850,* p. 55); and that a vetoed bill shall not become a law unless repassed by the legislature at the next succeeding session (*Debates and Proceedings of the Illinois Constitutional Convention of 1870,* ii, p. 1376).

[29] In some states, however, the legislature is not required, in this case, to repass it.

are, changed through the force of the governor's arguments to prevent its repassage. The governor's veto is, in fact, not often overridden, particularly if the governor is in political harmony with the majority of the legislature or if there is not an overwhelming public sentiment in favor of the enactment of the measure.

The veto power has probably been freely exercised by the majority of governors, and, during the nineteenth century, the frequency of a governor's vetoes was the principal gauge of his popularity. The extent of the governor's negative influence over legislation, however, is not to be measured merely by the actual number of his vetoes, for, although it is not usually considered good legislative ethics to argue against a bill on the ground that the governor will veto it if passed, nevertheless the governor's attitude towards pending legislation is often a matter of common knowledge, and such knowledge may cause a bill to be modified or prevent its passage altogether. Political harmony between the legislative and executive branches, as well as subserviency of the governor to the legislature, may decrease the number of bills actually vetoed.

The value of the executive veto from the standpoint of its influence upon the character of legislation can scarcely be doubted. Legislatures sometimes pass bills containing provisions which duplicate or, worse still, contradict provisions in the same or some other bill. The contradictions may be harmonized by judicial interpretation, but, meanwhile, the law is uncertain, and the best interests of the state require that it be vetoed. One of the principal uses of the executive veto is thus to give unity and coherency to the legislative product. "The oftener a measure is brought under examination," said Hamilton, "and the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some

common passion or interest." [30] Special and local interests doubtless need representation, but, on account of the system of logrolling in the legislature, the passage of bills favoring such interests has in some states been entirely too frequent and the practice requires the application of some corrective influence. This influence is found in the veto of the governor, who represents the whole people and therefore the general interests of the state. In case of the governor, moreover, responsibility for legislation is concentrated on one man, while in the legislature it is diffused. "If the governor," declared Mr. Archer in the Illinois Constitutional Convention of 1847, "permits a bill to become law which is wrong and unconstitutional, the whole responsibility to the people for such an act rests upon his head, and there only. But how different when the legislature may pass an act of this kind, for what is the responsibility when divided among one hundred men? . . . To whom do the people look for protection against all the evils of local legislation? They look, sir, to the governor. They call upon him to avert the evil by the interposition of the power they have vested in him. They say to him, our representatives have betrayed the trust we have reposed in them, they are about to bring upon us the accumulated evils of local legislation, and we look to you, as the representative of the whole people of the state and of all its great interests, to check it by your constitutional power." [31]

The governor's power of subsidiary legislation in pursuance of, or supplemental to, previously existing constitutional or statutory provisions is confined within narrow limits. This power is exercised by means of executive ordinances or regu-

[30] *The Federalist,* No. 73 (Ford's edition), p. 491.

[31] Illinois State Register (Springfield), July 20, 1847, i., No. 18. Cf. also *Debates and Proceedings of the Illinois Constitutional Convention of 1870,* ii., p. 1377, and *Debates and Proceedings of the Ohio Constitutional Convention of 1850,* pp. 54, 99.

lations. In no case is this power expressly granted to the governor by the state constitution, but in some instances it is implied in that instrument. Where the constitution expressly authorizes the governor to exercise a power, he has the authority, inherent in the power conferred, of making regulations necessarily incidental to its exercise. Thus the power granted by the constitution to the governor to grant pardons and reprieves necessarily carries with it, in the absence of any express restriction, the power of regulating the method of applying for and of passing upon applications for such pardons or reprieves. The constitution of Illinois gives the governor the right to exercise the pardoning power "subject to such regulations as may be provided by law relative to the manner of applying therefor." [32] The obvious inference from this provision is that the governor has the power to make any regulations incidental to the pardoning power that do not relate to the manner of applying for pardons. The more usual instance, however, of the exercise by the governor of the power to issue regulations is in pursuance of legislative authorization. The legislature of Massachusetts conferred upon the governor and council the power to make pilotage regulations.[33] This delegation of power was upheld by the supreme court of the state on the ground that "such regulations are in the nature of police regulations, the making of which, within defined limits, may be intrusted to other bodies than the legislature." [34] The governor of Georgia has been held to have power, under legislative authorization, to make all necessary regulations for the protection of the property of the state when not otherwise provided for.[35] In a number of states the governor is authorized by legislative act to issue rules governing admission to subordinate positions in

[32] Art. V, Sect. 13.
[33] Statutes of 1862, Chap. 176, Sect. 17.
[34] Martin *vs.* Witherspoon, 135 Mass., 175 (1883).
[35] Alexander *vs.* State, 56 Ga., 478 (1876).

the civil service. The ordinance power, however, is not so freely granted to the governor as it is to state boards and commissions. The courts frequently declare unconstitutional the delegation of legislative power to the governor as a violation of the principle of separation of powers.[36] A subsidiary legislative power is also possessed by the governor through the influence which he exerts over the actual character of a law in the supervision of its execution. Although, as will be seen, the powers of the governor in enforcing the law are not very broad, yet within the limits of his powers he may enforce or supervise the enforcement of a law in either a lax or a rigorous manner, and thus possibly in a material way modify the actual character of the law.[37] The governor thus in effect becomes to some extent a subordinate legislative body.

From this survey of the governor's legal powers in legislation, it will be seen that, although they are considerable in extent, they do not go so far as to make him a real leader in legislation. Legally, the real initiative still comes from the legislature itself. The governor may recommend measures, but legally his advice may be ignored. The governor's veto power is equivalent to a legislative vote of not less than one-half the legislature, but with this limitation, that it may be cast only in the negative. The exercise of his merely legal powers does not give the governor any very real and effective control over the shaping of the legislative policy of the state. He can sometimes block vicious legislation, "jokers," "riders," and "jobs," but he has legally no correlative power of initi-

[36] See, for example, Gilhooley *vs.* City of Elizabeth, 66 N. J. Law, 484 (1901); and Arnett *vs.* State, 80 N. E. 153 (1907).

[37] It has even been held that the governor may order that a certain portion of a law be disregarded and remain unenforced if, in his opinion, it is unconstitutional. State *vs.* Buchanan, 24 W. Va., 362 (1884). But he has no power to give a practical interpretation to laws, in conflict with legal opinions properly given by the judiciary. *Ex parte* Davis, 41 Me., 38 (1856).

ating and pushing through legislation which is demanded by intelligent public opinion. Unless the governor is given both these powers, he ought not rightfully to be held responsible for the course that legislation takes. But, nevertheless, the people are more and more holding him responsible for the results of the legislative process and are more and more looking to him to manage and control the legislature. This development is due in part to a growing failure of legislative bodies adequately to represent their constituencies and properly and efficiently to perform the functions devolved upon them, and in part to a natural tendency, both of the people as a whole and of the members of the legislature, to follow the leadership of some forceful and statesmanlike personality.

For many years past the people have realized that the state legislatures have not represented the interests of the whole state and of the whole people as faithfully as they have represented private, special and local interests. Theoretically, in order to remedy this condition of affairs, the people should hold the legislators to a proper responsibility for their acts by turning out of office those who have betrayed their trusts.[38] But in practice this cannot be so easily done for several reasons, among which is, that, in the hydra-headed legislative body, no strikingly prominent figure can be found upon whom responsibility can be saddled. The course of legislative procedure is so confused, vicious legislation may be railroaded through in so many innocent disguises, and desirable legislation may be emasculated, smothered, deprived of teeth, and killed in so many different ways during the scuffle and scramble of legislation, that the people find it impossible to fix the blame within the legislature. As has been so often observed, the actual process of legislation has deserted the legislative chambers, and now takes place behind the virtually closed doors of committee rooms. And even if the

[38] See "The Constitutional Functions of Executives," in *Bench and Bar,* xx, No. 3, March, 1910, p. 85 *et. seq.*

progress of the public business within the committee rooms were entirely open to the public view, the people would doubtless still be confused by the multiplicity of committees, each having to do with only a comparatively small part of the whole field of legislation.

The public business thus falls into a deplorable morass from which, under present conditions, it can apparently be rescued only by a resort to drastic measures—measures, largely extra-legal in character, which pay scant respect to the time-honored principles of representative government and separation of powers. Some means must be found for controlling the formulation of public policy in the legislature in spite of its defective organization and procedure. This means has been found in several different quarters: first, in boss-rule; second, in the popular initiative; and third, in the governor's extra-legal influence over legislation. The power of the boss has been due to the fact that he has performed two functions which, under present conditions, must of necessity be assumed by some person or body. These are the dictation of legislation and the appointment of nominally elective officers. In other words, he has controlled both legislation and administration. The legislature, as at present constituted, must of necessity be led by some person or persons. It cannot pass upon all measures that come before it without guidance from some source. Important pieces of legislation do not, as a rule, originate in the legislature itself. They usually emanate from outside sources, sometimes legitimate, but too often illegitimate. The bosses have too frequently dictated the passage or the side-tracking of measures. But, since the legislature, which is the body empowered by law to perform this function, is not fitted to do so, the function must of necessity be either usurped by some body or organization outside the governmental system, such as the boss or the political machine, or else transferred to some other body within the governmental system better qualified for its proper

discharge. Hitherto the former alternative has been more frequently followed, but recently means of controlling legislation has been found in the popular initiative and in the governor's extra-legal control over legislation.

Without minimizing the value which the popular initiative may have under some circumstances in increasing the degree of democratic control, nevertheless the experience which we have thus far had with it seems to indicate that its legitimate application is confined to those matters upon which the people are most capable of passing, viz., simple and broad questions of public policy. In the formulation even of such questions, the people, on account of their unorganized condition, need guidance, and such guidance may often be furnished by a governor who has the qualities of leadership. Better still, the governor, as the "representative-at-large" of the people, may act directly in advocacy of important legislation demanded by the public interests. The true initiative of the people is not necessarily a legal initiative, but it may sometimes be found in the originating and stimulating force of articulate public opinion operating through the effective instrumentality of the responsible executive head of the state government.

"The whole country," remarked President Wilson, while governor of New Jersey, "since it cannot decipher the methods of its legislation, is clamoring for leadership, and a new rôle, which to many persons seems little less than unconstitutional, is thrust upon our executives. The people are impatient of a president who will not formulate policy and insist upon its adoption. They are impatient of a governor who will not exercise energetic leadership, who will not make his appeals directly to public opinion and insist that the dictates of public opinion be carried out in definite legal reforms of his own suggestion." [39] Thus, when powerful impulses from

[39] Address before the Commercial Club of Portland, Oregon, May 18, 1911.

the entire citizenship urge a governor on, he may, if he seizes the opportunity, forge gradually, by the accretion of precedent and the growth of custom, an instrument of control over both the initiation and the passage of legislation. This instrument is his personal and political influence, supported by the full force of "pitiless publicity" and public discussion. This has occasionally developed into a much broader power than that which is usually associated with the right of sending messages and submitting recommendations to the legislature. In this new rôle, the influence of the governor begins even before he is elected in assuming the leadership of his party,[40] defining the issues of the campaign, and outlining the program of legislation which, if elected, he will put through the legislature.[41] After his election, the governor, in order to keep public attention concentrated on the principal issues, may restrict his messages "to a few definite recommendations embodying the policies in favor of which the party has pronounced in its platform or those for which he is willing to assume the responsibility." [42]

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[40] President Wilson, when a candidate for governor of New Jersey, declared openly that, if elected, he would be both the leader of his party and governor of the whole people of the state. *New York Evening Post,* October 5, 1910.

[41] By a recent act of the New Jersey Legislature a step was taken towards granting the governor or candidate for governor in each party a greater influence over the formulation of the public policy which, as governor, he may have to carry into effect. It provided that a state convention of each party should be held annually for the purpose of adopting and promulgating a party platform, which convention should be composed of the party candidates nominated at the party primaries for the office of member of the assembly or state senator, together with hold-over senators, members of the state committee, and "the candidate of the party for governor nominated at the said primaries in the year in which a governor is elected, and in each year in which no governor is elected, the governor of the state shall be a member of the convention of the political party to which he belongs." *New Jersey Session Laws of 1911,* Ch. 183, p. 276.

[42] J. W. Garner, Executive Participation in Legislation, *Proceedings of the American Political Science Association,* x, p. 183.

In initiating and promoting the passage of bills embodying his recommendations, the governor may appeal to the legislature either directly or indirectly through the people. Although, in order to avoid friction, the governor does not directly introduce completely drafted bills, nevertheless bills known as "administration bills" are sometimes introduced in state legislatures, which are nominally fathered by some member of the legislature, but which really emanate from the governor. By a rule of the Illinois House of Representatives, adopted in 1913, a bill or resolution introduced to carry out a recommendation of the governor may, by executive message addressed to the speaker, be made an administrative measure. When such a measure has been reported out of committee, it has precedence over all other bills except appropriation bills. This rule "is intended to give assurance to the governor that measures which he recommends will be given fair consideration and by such assurances to impose upon him the obligation to have a legislative program." [43] In furtherance of the administration's legislative program, governors frequently send for prominent members of the legislature, particularly chairmen of important committees, and urge them to vote for the bills embodying the program to which the administration is pledged. Governors even sometimes appear in the committee rooms and at legislative hearings in order to discuss in person questions of public policy and to advocate the measures that public opinion demands. The governor thus actively coöperates with the legislature and exerts a positive influence in the working out of the legislative program. In two states, as already pointed out,[44] the governor has the constitutional power of suggesting amendments to pending legislation. But this power may be, and often is, exercised extra-legally. For example, Governor

[43] M. D. Hull in *American Political Science Review,* May, 1913, p. 239.

[44] Above, p. 63.

Philipp, of Wisconsin, during a recent legislative session, suggested an amendment to the jitney bus regulation bill, which was embodied in the final draft. Thus the personal influence of the governor over the course of legislation is actively and constantly exerted.

The governor may be no wiser than the majority of the legislature, but he has a wider outlook over the interests of the state, and represents a broader constituency. In a word, he is more "state-minded." If the governor is supported by the full force of public opinion his demands may at times become so irresistible that he approaches to the position of a sort of official boss. This power does not properly consist in coercion or the selling of appointments for favorable votes on administration bills. Such tactics, though often resorted to, sooner or later undermine the influence of the executive. It consists rather in his power to represent, to persuade, and to lead the people. If by his qualities of leadership and the force of his arguments he can persuade the people during the campaign, the same qualities will give him such a personal ascendency over the legislature after his election that he will be able to lead that body also.[45] This is doubtless a species of bossism, but there is little danger in such bossism, for the governor can be held accountable by the people for his acts, while the unofficial boss cannot. The concentration of large power in the hands of a single responsible officer need no longer excite fear of tyranny, for such a condition may be a step towards real democracy. It merely implies that, the legislature having failed to perform its theoretical function as an instrument of true democracy, the people have turned to the governor as a more likely means for carrying out the popular will.

It would be a mistake to suppose that the exercise by the governor of this extra-legal power over legislation necessarily

[45] See address of Woodrow Wilson before the House of Governors, Frankfort, Kentucky, November 29, 1910.

implies that he is to be in continual conflict with the legislature. On the contrary, he may and should, as far as possible, work in entire harmony and coöperation with them. The executive and legislative branches of the government should be effectively harnessed together in the common public service. But, in the case of a recalcitrant legislature, the governor's power of appealing directly to the people always remains in reserve, though its existence would usually render its exercise unnecessary. For, no matter how jealous a legislature may be of its own prerogatives, no matter how incapable it may be of being bulldozed, wheedled or cajoled by threats or intimidation on the part of the governor, it can seldom withstand the force of pitiless publicity wielded by a vigorous, independent, and courageous governor, supported by the pressure of intelligent and aroused public opinion. And it is the function of the governor to keep it aroused by a continuous and relentless application of repeated doses of publicity throughout the whole course of legislation.

The open leadership of able, responsible and fearless governors is thus becoming an effective instrumentality for the formulation and control of public policy by public opinion. This development, it is true, has as yet by no means been carried out to its fullest or logical extent. The legal powers of the governor in legislation are still quite insufficient and incommensurate with his responsibility, for constitutional and legal reform usually lags far behind actual practice. Even the extra-legal power of the governor has developed haltingly and uncertainly and still frequently falls far behind the extent of his responsibility. Governors have not yet followed the example of President Wilson in addressing the legislatures in person instead of sending written messages. Nor have governors or their cabinet officers as yet the privilege of seats upon the floor of the legislative chambers, where public debate and the constant interchange of views and arguments between the executive and the members of the legis-

lature would not only enable the legislature more effectively to criticize the conduct of the administration but would also favorably affect the character of the legislative product, and help greatly to clarify public opinion upon pending issues. Even with these limitations the governor's extra-legal powers in legislation may be denounced by some as usurpation and a violation of time-honored theories. But the justification lies in the results, which have been uniformly in the direction of increasing popular control over the state business. In particular, the increasing executive leadership in matters of legislation has a favorable effect upon the administration, for, with his broader perspective and more intimate acquaintance with the needs of the administration, the governor is able to some extent to neutralize the injurious effects which detailed legislative control over the administration frequently entails.

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CHAPTER IV

THE GOVERNOR'S ADMINISTRATIVE POWERS

At the beginning of the development of the state governments, the governor, as we have seen, was principally a political officer, while control of the administration was almost entirely in the hands of the legislature. The latter body still retains large powers of control over the administration, but the governor's administrative powers have increased and, though still subject to serious limitations, are by no means negligible. The general, as distinguished from the special, administrative powers of the governor consist of his power to execute the laws, to supervise the subordinate administrative officers, and to make appointments to and removals from offices in the administration.

It is worth while to consider, in the first place, the methods whereby executive power is vested in the governor by the state constitutions. The Constitution of the United States provides that "the executive power shall be vested in a President," whereas, in respect to the judicial power, the same instrument declares that it "shall be vested in one supreme court, and in such inferior courts as Congress may . . . establish." This language would seem to imply, *prima facie,* that, while the judicial power may be divided, the executive power is concentrated in the President. Such is, in fact, the case, though not as a result of this provision,[1] but as a result of the president's power of removal. Some of the state constitutions, including those of New York, New Jersey, Maryland, Indiana and Wisconsin, follow the language of the

[1] See Kendall *vs.* United States, 12 Peters, 524.

United States Constitution and declare that "the executive power shall be vested in a governor." This is a verbal inaccuracy, for "the executive power" is in reality vested not only in a governor but also in various other officers and boards, established by the constitution or by statute. It is not strictly accurate to speak of the governor as *the* head of the administration, for there are many such heads, though the governor is usually the most important and conspicuous head. The majority of the state constitutions recognize this distinction by providing that "the supreme (or chief) executive power shall be vested in a governor." It will thus be seen that the word "supreme," as here used, operates to limit rather than to extend the governor's power. It implies that, though the supreme or highest executive power is vested in the governor, there are also subordinate executive powers vested in other officers, over whom the governor may not necessarily exercise any control. This situation is made clearer still in some constitutions, such as those of Pennsylvania and Illinois, which, while declaring that the supreme executive power shall be vested in a governor, also provide that the executive department shall consist of a governor, lieutenant-governor, secretary of state, and other officers. On the whole, however, whatever the particular wording of these provisions, the result, in respect to the governor's powers, is, for all practical purposes, the same. The courts have almost uniformly held that the governor has little or no inherent executive power under these provisions. In other words, the rule of delegated powers and strict construction has been nearly everywhere applied to the governor, so that legally he is not usually considered as having any particular power unless it is granted to him, in the constitution or statutes, either expressly or by necessary implication.[2]

[2] Field *vs.* People, 3 Ill., 79 (1840); State *vs.* Bowden, 92 S. C., 393 (1912). The principal exception to this doctrine is where it is held that the governor may exercise a power which, though not granted

A general administrative power of the governor, found in practically all the constitutions, is that which authorizes him to "take care (or see) that the laws are faithfully executed." The power thus conferred, in the absence of further specific provisions, is vague and indefinite in character and extent. The "laws" referred to doubtless include to some extent constitutional and common law provisions, but, in the main, the power comes into operation only as the result of some legislative enactment authorizing the governor to carry out or execute some particular provision of the statutory law. The Constitution of the United States also authorizes the president to take care that the laws are faithfully executed, and, under it, he may take measures to protect a justice of the supreme court from violence, in the absence of any congressional authorization to that effect.[3] The governor's powers, however, have not usually been construed to extend so far as to enable him to take any specific action in the enforcement of the laws in the absence of any specific constitutional or statutory provision to that effect. The governor, for example, has no inherent authority to sue in the name of the state as a result of the provision requiring him to enforce the laws.[4] Nor has the governor the right to take out insurance on the state capitol, in the absence of any law specifically authorizing him to do so, even though the

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to him either expressly or by necessary implication, is nevertheless incidental to an expressly granted power. Cf. Keenan *vs.* Perry, 24 Tex., 253.

[3] *In re* Neagle, 135 U. S., 1.

[4] Henry *vs.* State, 39 So., 856. But *per contra,* see the case of Louisiana *vs.* Dubuclet (22 La. Ann. 602), where it was held that, since the governor is the proper representative of the state and bound to protect her interests, he may intervene in behalf of the state and take an appeal where other officers, such as the attorney-general, are absent from the state or fail to discharge their duties in taking an appeal; or the case under the same title in 25 La. Ann. 161, where it was held that the governor's right to take an appeal cannot be taken away from him merely because the attorney-general has already taken an appeal

legislature has appropriated the funds to pay the premiums.[5] It is not expected, as a rule, that the governor will, in person, execute the laws, unless conditions require the calling out of the militia, of which he is commander-in-chief. It will be noted that the constitutions do not provide that the governor shall execute the laws, but merely that he shall see that they are executed. It thus becomes his duty "carefully to observe the manner in which the different officers of the government exercise their proper functions and execute the laws committed to their charge, or their failure to perform such duties; and when they fail to act, or act improperly, if he has the power to remove them from office, to do so; or if he has not, to bring the subject to the cognizance of that department of the government which has the power to remove or punish them." [6] Ordinarily, therefore, the governor merely supervises to some extent the officers upon whom rests the duty to carry out the various laws of the state. Such supervision, however, is very incomplete and the machinery for the execution of the laws is for the most part in the hands of officers, both state and local, over whom the governor has little or no control. If the governor is to be held responsible for the execution of the laws and for the fulfillment of his oath to support the constitution, then it logically follows that he ought to have full control over the selection and the official acts of those agents who are the "arms of the governor," and upon whom he must depend to a large extent for the enforcement of the laws. In this respect, however, the organization of the state administration is far from logical.

The legal powers whereby the governor exercises control over the personnel of the administration are those of appointment to office, supervision or direction while in office, and suspension or removal from office. At the beginning of

[5] Shields *vs.* Bennett, 8 W. Va., 74 (1874).
[6] Shields *vs.* Bennett, 8 W. Va., 89.

the history of the state governments, as we have seen, the power of appointment of administrative officers was largely in the hands of the legislature. During the first part of the nineteenth century, the power of selecting most of these officers was transferred to the electorate. During this period the governor was considered as being primarily a political officer and the power of appointment, it was felt, did not rest inherently, or even more properly, in the executive than in the other departments or authorities of the government.[7] Both the methods of legislative appointment and popular election, however, have failed to prove satisfactory in practice. It is not surprising, therefore, to find that, in the more recent constitutions, the governor's power of appointment has been broadened. Furthermore, the legislature, in creating during late years a large number of new officers and boards, has usually vested their appointment in the governor. The increase of the governor's power of appointment has been due, not only to the unsatisfactory nature of other methods, but also in part to the influence of the increasing complexity of social and economic conditions of modern life, and to the consequent feeling that there should be an increase in the effectiveness of executive and administrative action, in order that the purposes for which the executive authority is established may be more fully effectuated. In spite of this tendency, however, the governor's power of appointment is still greatly inferior to that of the President of the United States, and is subject to serious limitations.

The governor's power of appointment is derived both from the constitution and from statutes. The constitutional power is sometimes in the form of authorization to appoint certain specific officers. The constitution of Pennsylvania, for example, empowers the governor to appoint the secretary of the Commonwealth, attorney-general and superintendent of public

[7] Cf. Fox *vs.* McDonald, 101 Ala., 51 (1893).

instruction.[8] The larger share of the governor's constitutional power of appointment, however, comes from such omnibus clauses as that found in the Illinois constitution, providing that the governor shall appoint all officers whose offices are established by the constitution or created by law, and whose appointment or election is not otherwise provided for.[9] The governor's power to appoint to offices created under legislative acts is more liable to fluctuate in extent than when provided for in the constitution. When the governor and the majority in the legislature belong to the same political party, his appointing and removal powers tend to increase, while the contrary is the case if he is out of political accord with that body. The officers whom the governor may appoint, whether under the constitution or statutes, belong principally to the state executive department, but he also has some power of appointing judicial and local officers.

Although the governor has thus a considerable patronage, the number of offices subject to his disposal in the more important states, such as New York, Pennsylvania and Illinois, running up into the hundreds, nevertheless the most important state officers, usually denominated heads of departments, are still nearly everywhere either elected by popular vote or, in a few states, appointed by the legislature. This situation is a relic of the outworn idea that one-man power is dangerous and that the heads of departments, instead of being the effective instrumentalities of the governor, should be checks upon him.[10] This idea of checks and balances within the executive department is seen in an extreme form in the following statement of a member of the Louisiana Constitutional Convention of 1845: "It is said that, perhaps, the secretary of state, who is elected by the people,

[8] Art. IV, Sect. 8.

[9] Art. V, Sect. 10.

[10] Cf. *Debates in the Louisiana Constitutional Convention of 1845*, p. 290.

may be of opposite political opinions from the governor. If this should happen, so far from being an objection to the system, it is an advantage, for no one can keep as sharp a lookout as a political adversary; and if such a one is secretary of state to a governor of opposite political opinions, he is sure to be a most efficient check upon the executive." [11] The check upon the governor, however, in so far as it is desirable at all, should come from the other departments of the government and from his responsibility to the people, and not from administrative officers in his own department. The election by the people at the same time of both the governor and the heads of departments usually secures political harmony between them, and this helps somewhat to decrease the injurious effects upon the conduct of the administration arising from the governor's inability to select such heads. Even when the governor and heads of departments belong to the same political party, however, there may be no real or administrative harmony between them, on account of factional fights within the party. Furthermore, it may, and sometimes does, happen that a candidate for governor, who runs stronger than the rest of his ticket, will be elected, while the candidates of his party for the other executive offices will fail of election. For example, Governor Hughes, of New York, was elected as a Republican, but the principal heads of state departments during his administration were Democrats. On the other hand, in Massachusetts during recent years, the governor has been a Democrat while the other executive state officers have been Republicans. President Wilson, while governor of New Jersey, had a hold-over Republican attorney-general. Thus it may happen that the governor's powers, as far as the conduct of the administration is concerned, may, under present conditions, be considerably crippled.

The heads of state executive departments have never been considered as occupying the same relation towards the gov-

[11] *Ibid.*, p. 292.

ernor that the members of the president's cabinet in the national government occupy towards their chief. Although party considerations may bring the corresponding state officers into close touch with the governor, nevertheless they are not in legal contemplation considered as the confidential advisers of the governor, for they are not subject to his direction, but, on the other hand, their duties are prescribed by law. Owing to this condition of affairs, it has sometimes been maintained that there would be no propriety in vesting the appointment of these officers in the governor, but that, on the contrary, they should be either appointed by the legislature or elected by the people.[12] This, however, is equivalent to arguing in a circle, for the fact that these officers have never developed into a cabinet to the governor is due principally to the fact that their duties and powers are prescribed by the legislature, and not by the governor. That this system of administrative insubordination is likely to produce an unsatisfactory and even disastrous condition of affairs has often been pointed out by careful observers. In the New York Constitutional Convention of 1821, Chancellor Kent argued against the appointment of the attorney-general by the legislature on the ground that this was not an appropriate function of that department. "The attorney-general," he said, "was an executive officer, and his appointment should emanate from the executive department."[13] Members of the Louisiana Constitutional Convention of 1845 declared that the election of the secretary of state by the people would be equivalent to throwing confusion and disorder into the administration of the executive department."[14] That officer, it was argued, "ought certainly to be independent of any servility to the governor, but at the same time the governor should

[12] See *Debates of the Pennsylvania Constitutional Convention of 1873*, ii, p. 350, and v, p. 211.

[13] *Reports of the Proceedings and Debates*, p. 302.

[14] *Debates*, p. 290.

not be placed in a servile attitude toward the secretary of state, without whom the governor could scarcely perform a single act. Suppose that the secretary of state chooses to arrogate to himself that the governor shall not examine the archives, that he shall have no control over them, would not that be an absurd and extravagant idea, and inconsistent with the supervision which the governor is presumed to exercise not only over his immediate department, but over every other officer of the state, to see that the laws are carried into effect?" [15]

Although it thus appears that the selection of the older constitutional officers, usually denominated heads of departments, has not yet been placed in the hands of the governor, nevertheless to him has been intrusted the appointment of most of the newer administrative bodies, boards and commissions, created within recent years. The powers and duties of some of the older constitutional officers are still quite important, but relatively to those of the whole body of existing state administrative agencies, they are not now so important as formerly. The governor's power of appointment of these newer agencies, therefore, represents an increase of his control over the personnel of the administration that is worthy of notice. There are, however, limitations upon his power of control which materially diminish its importance. In order to insure some degree of continuity in the policies of state boards and commissions, the practice is usually followed of gradually renewing their personnel through the device of overlapping terms and the appointment of one or more new members each year. Therefore, where a board consists of seven or nine members, a governor may not, during his term of office, have an opportunity of appointing a majority of the board. This naturally decreases what little control the governor might otherwise have over the conduct of such boards. The provisions of legislative enactments fixing

[15] *Ibid.*, p. 293.

the length of terms for administrative officers and boards who are appointed by the governor operate also to limit his control over such bodies. Legislative fixation of terms of administrative officers is a form of legislative removal at the end of a term, differing usually, however, from other forms of removal in that it is of a more general character and not directed at a particular person. A result of legislative fixation of terms, operating as a limitation upon executive control of the administration even more seriously perhaps than legislative removal at the end of the term, is, where the governor has no power of removal, legislative maintenance of an official in office during the continuance of his term. The executive discretion in making appointments is also hampered by legislative enactments providing that appointees must comply with certain specified qualifications. Civil service laws, now found in a number of states, constitute a form of such enactments, but, as they generally apply only to appointees to the minor positions, they do not seriously affect the governor's power of appointment. Qualifications such as those found in Iowa, requiring the governor to choose the commissioners of pharmacy from the most competent pharmacists of the state, are too indefinite to affect seriously the governor's appointing power. In many cases, however, qualifications laid down by statute are definite in character and do substantially affect the executive control of appointments. For example, by a Florida law of 1905,[16] the governor was empowered to appoint the members of the state board of control, subject to the provision that the members should be distributed by residence among the different sections of the state, and that no member should be a resident of any county in which any institution under the control of the board should be situated.[17]

The appointing power of the governor has been thus far

[16] Ch. 5384.

[17] This act was upheld as constitutional by the Supreme Court of the state. See State *vs.* Bryan, 50 Fla., 293.

spoken of as if vested in him alone. It is true that, in most states, there are a number of offices which the governor alone is empowered to fill. But it is also true that a great many appointments, and these usually the most important at his disposal, can be made by him only in association with some other body. This association takes several forms in accordance with the character of the body with whom the governor must act. With the object of preventing political considerations from entering into the appointment of members of boards requiring technical or professional qualifications, it has sometimes been provided that the governor shall make the appointment from a list of names submitted to him by the related professional association of the state. A law of Missouri,[18] for example, required the governor to appoint a state board of barber examiners to be recommended by certain named associations.[19] This limitation upon the power of appointment, however, cannot be carried so far as to encroach upon the proper executive power of the governor,[20] nor upon the constitutional right of the Senate to approve the appointment.[21]

Another form of limitation upon the governor's power of appointment through association with other bodies is that which joins him with some of the other principal state executive officers in an *ex officio* appointing board. Thus, in Iowa, the secretary and members of the state board of health are appointed by a board composed of the governor, secretary of state and the auditor of state. An act of Maryland provided

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[18] Revised Statutes, 1899, Ch. 78.

[19] The action of these associations in accordance with the law could be compelled by *mandamus*. *Ex parte* Lucas, 160 Mo., 218.

[20] A Missouri law of 1911, providing for a non-partisan board of election commissioners in cities to be appointed by the governor, from a list submitted by the state committees of the political parties, was held invalid as encroaching on the executive power of the governor. State *vs.* Wright, 158 S. W., 823.

[21] State *vs.* Griffin, 69 Minn., 311 (1897).

that the chief officer of the insurance department of the state should be appointed and removed by the governor, state treasurer, and state comptroller.[22] This arrangement puts the appointing power of the chief executive, so to speak, into commission, and accentuates the already too conspicuous plurality of heads in the state administration. However, this particular form of diffusion of power is now somewhat uncommon as compared to other forms.

By far the most frequent and important limitation of this character upon the governor's appointing power is that which associates its exercise with the advice and consent of an executive council or with the upper branch of the legislature. The executive council is now found in only a few, principally New England, states. In the other states a large majority of the most important appointments at the disposal of the governor are subject to the confirmation of the senate. In either case, the ostensible objects of the arrangement are to secure a greater degree of popular control over appointments, to give the governor the benefit of capable advice, and to prevent the entrance of party considerations into the making of appointments. These objects, however, are seldom, if ever, fully attained, and frequently not at all. On the contrary, the division of power and responsibility between the governor and the senate ordinarily lessens popular control over appointments and makes directly for the entrance of party considerations. In the national government, the power of the senate to confirm the president's appointments has, through usage and tradition, become sometimes merely nominal. His appointments to cabinet positions are confirmed as a matter of course. The power of the state senate over the governor's appointments, however, is very real, and, if the upper branch is controlled by the political party opposed to the governor, the result is apt to be either a deadlock or the subservience of the governor. Such a condition of

[22] Maryland Code Public General Laws, 1896, Art. 23, Sect. 121.

affairs is still more apt to happen where, as in Pennsylvania and Iowa, more than a mere majority of the senate is required to ratify the governor's nominations. A small group of senate members may then tie up the machinery of government.[23] Even when only a mere majority of the senate is required for confirmation, and although the governor is in political harmony with the majority of the senate, it may nevertheless happen, and frequently does happen, that the governor will be under the necessity of consulting the influential leaders of the party in the senate before making appointments. It must be admitted that, in the past, such consultations have frequently had one or the other of two results: either the governor has agreed to nominate to important administrative posts men who are acceptable to the party leaders in return for the passage of legislation which he desires, or else the governor has yielded to the senate on matters of legislative policy in return for the consent of that body to ratify the nomination of men whom he desires to appoint.[24] If the power of appointment were concentrated in the hands of the governor alone, there would still be a possibility that the governor might sometimes be tempted to trade appointments desired by party leaders in the legislature for favorable votes on administrative measures. There would, however, be much less danger of such a result, because the sole responsibility for the appointments would rest squarely upon the governor. He could not blame the senate for bad appointments, and he would not so readily run the risk of incurring popular disapproval through making purely partisan appointments without regard to the qualifications of the appointees for the positions. It would thus be possible to secure the benefit

[23] Cf. *Debates of the Pennsylvania Constitutional Convention of 1873*, v, pp. 206-207.

[24] In the case of ratification by an executive council, this statement, of course, would not apply, and the governor's position in regard to the legislature would be stronger.

of what Francis Lieber has called "one of the chief advantages of a Uni-Executive, now universally adopted in America, viz., that the Executive is lifted sufficiently above, or singled out from the rest of the citizens, both to feel somewhat, at least, disentangled from party meshes, and to individualize responsibility." [25] Under the present limitation of confirmation by the senate, however, there is usually little sense of responsibility either in the appointing authority or in the appointee. The subservience of the governor is sometimes such that the real power of appointment is in the senate. The considerable powers of appointment which the legislature formerly possessed have been largely shorn away, but the present system of appointment is a compromise between legislative and executive control, which, in practice, often transfers the real control to the invisible powers behind the government. In order that the governor's control over the administration may be increased, it is almost essential that there should be a greater concentration of the power of appointment in his hands.

The officers whose appointment may be made by the governor, or governor and senate, are, as already pointed out, principally state executive and administrative officers. In the national government, judges have always been appointed by the President and senate. In some of the older states the governor at first also appointed judges, as, for example, in New York, prior to 1847. This power has, however, in nearly all states been transferred to the electorate, except in a few, principally New England, states, where the governor, with consent of council, still appoints judges of the highest state courts. Dissatisfaction with the working of the elective system, however, is causing an increased sentiment in favor of a return to the appointive system. It has been proposed that the governor should be allowed to recommend candidates for

[25] *Reflections on the Changes Which May Seem Necessary in the Constitution of New York*, p. 26 (1867).

judgeships to the people, who should vote for them upon a non-partisan ballot, on which the candidates recommended by the governor should be so designated.[26] The expectation is that, in practice, this would be tantamount to a real appointive system. A committee of the New York County Lawyers' Association, headed by Joseph H. Choate, would go farther, and recommends that all the judges of the Supreme Court and of the Court of Appeals of that state be appointed by the governor, with the consent of the senate.

As a result of the system of decentralized administration in the American states, or as part and parcel of it, we find that the governor has very little power of appointing local officers. The widespread feeling in favor of home rule and the prevailing habit of electing administrative officers by popular vote operate to prevent the vesting of this power in the governor. The principal exception to this rule is the power granted to the governor in a few states, such as Missouri, Massachusetts, and Maryland, to appoint the board of police commissioners for the most populous city in the state.[27] Here and there the governor has also been authorized to make appointments to miscellaneous local offices, such as boards of county school commissioners,[28] county boards of elections,[29] local health officers,[30] and county assessors.[31] He is also empowered in some states to appoint justices of the peace and police magistrates and to fill vacancies occurring in the offices of sheriff and justice of the peace.[32]

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[26] *The Short Ballot in the State of New York,* pp. 8-10.

[27] Such boards, however, are in reality state officers with local functions.

[28] Maryland Code, Art. 77, Act of 1892, Ch. 341.

[29] New Jersey Public Laws, 1898, p. 240.

[30] New Jersey Public Laws, 1900, p. 104.

[31] Oklahoma Laws 1910-11, Ch. 152, Sect. 1.

[32] In the New York Constitutional Convention of 1821, Martin Van Buren and Rufus King argued very forcibly in favor of giving the governor the power of appointing sheriffs and local officers but their view has not prevailed. *Proceedings and Debates,* pp. 341-342; 386-387.

The governor generally has the power of filling vacancies in state offices whenever they occur, provided no other method of filling the vacancy is specifically provided by the constitution or laws. Such appointments tend to be more free from the control of the senate than in the case of original appointments. They sometimes do not require the confirmation of the senate at all,[33] and, in other cases, the governor may make temporary appointments during the recess of the senate until the next meeting of that body, when he shall make nominations subject to the usual confirmation of the senate. There is a tendency to confine the governor's power of filling vacancies to appointive officers, but in some cases he may also fill vacancies in elective offices.[34]

In connection with the governor's power of appointment, it should be mentioned that the process usually consists of three steps, the nomination by the governor, confirmation by the senate, and the issuance of a commission by the governor to the appointee. It does not necessarily follow that, after the first two steps have been completed, the third must follow. The issuance of the commission by the governor has been held to be a discretionary act, which he may or may not perform.[35]

It will be seen from this review that the governor's power of appointment of administrative officers is subject to serious limitations in respect both to its scope and to its efficacy in action. Even, however, if these limitations did not exist, the appointing power, in itself, would be found to be an imperfect means of administrative control. If the exercise of the governor's power over administrative officers were completely exhausted in the act of appointment, his appointees, unless candidates for reappointment, having nothing further

[33] See State *vs.* Finnerud, 7 S. D., 237 (1895); and State's Prison *vs.* Day, 124 N. C., 362 (1899).

[34] See, for example, Constitution of Pennsylvania, Art. IV, Sect. 8.

[35] Harrington *vs.* Pardee, 1 Calif. App., 278 (1905).

either to fear or to gain from him, might assume an attitude of independence calculated to interfere seriously with effective administration. It is doubtless true that, in the case of many, if not the majority, of state administrative officers appointed by the governor, his control over them ceases with the act of appointment. A growing realization of the extent of the evils and disadvantages arising from this arrangement, however, has within recent years brought about the adoption in a number of states of certain measures designed to give the governor some control over such officers after they are appointed. Such measures consist of provisions extending to the governor some degree of direction and supervision over them while in office, and of suspension and removal from office.

In accordance with general principles previously stated, the governor has no legal powers of supervision or direction except in so far as they are specifically granted by the constitution or statutes. The governor has no power of organizing the administrative services of the state into departments, nor can he, in the interests of efficiency, transfer a particular function or service from one department to another. These matters, as well as the specific duties to be performed by state administrative officers, are largely regulated by law.[36] Although this is the general rule, nevertheless some progress has been made toward giving the governor a certain degree of control over such officers. For example, it is sometimes provided that the approval of the governor must be had for the appointment of assistants or deputies to the heads of departments or bureaus, such as the state commissioner of labor,[37] or the state game commissioner;[38] or

[36] Pinckney *vs.* Henegan, 2 Strob. (S. C.), 250 (1848); Collins *vs.* State 8 Ind., 344 (1856); State *vs.* Bailey, 16 Ind., 46 (1861); Slack *vs.* Jacob, 8 W. Va., 612 (1875); People *vs.* Santa Clara Lumber Company 106 N. Y. S., 624 (1907).

[37] New Jersey Public Laws, 1904, p. 168.

[38] Hurd's *Illinois Revised Statutes*, 1912, p. 1244.

that the governor, acting with other officers, shall determine the annual allowance of a state board for expenses within maximum and minimum limits fixed by the legislature.[39] Some degree of supervision also arises from provisions generally found in state constitutions empowering him to see that the laws are faithfully executed, and to require information in writing from the officers in the executive department upon any subject relating to their duties. Such requisitions for information may be made at any time. In addition, such officers are also required in most states to make regular reports to the governor at periodical intervals. The officers from whom such information and reports may be required include, in some states, not only the so-called heads of departments, but also managers of state institutions and lesser administrative officers.[40] The character of the information which may be required in the reports is sometimes specified, such as accounts of moneys received and disbursed,[41] or the exact condition of the public funds on hand.[42] These provisions may sometimes be useful in enabling the governor to investigate and bring to light irregularities or other facts of a compromising character. In conducting such investigations, the governor is sometimes authorized to employ accountants, subpena witnesses, administer oaths, and require the production of books and papers.[43] Nevertheless, these provisions have not operated in practice to give the governor any very effective, comprehensive, or continuous control over the administration. Requests for information are apt to be spasmodic and special in character. The control which they exert may have the effect of guarding against or unearthing

[39] New Jersey Public Laws, 1886, p. 333.

[40] Constitution of Illinois, Art. V, Sect. 20; of Alabama, Art. V, Sect. 121; of Virginia, Art. V, Sect. 74.

[41] Illinois Constitution Art. V, Sect. 20.

[42] South Dakota Compiled Statutes, 1913, p. 88.

[43] New York Consolidated Laws, 1909, p. 1641; Constitution of Virginia, Art V, Sect. 74. Cf. Attorney-General *vs.* Jochim, 99 Mich. 358.

glaring irregularities, but in themselves they are not well adapted positively to assure efficiency in administration. Furthermore, official reports and answers to requests may often be drawn up in such a manner as to conceal or gloss over the essential facts.

The further question remains as to what can be done in case the governor's inquiries disclose irregularities or in case the officials to whom they are addressed make false reports or refuse to report at all. The constitutions are usually silent on this point. The Illinois constitution, however, provides that any officer who makes a false report shall be guilty of perjury,[44] while that of Alabama declares that any officer who makes a false report or fails to report on demand is guilty of an impeachable offense.[45] In case of these derelictions on the part of such officers, therefore, it is contemplated that judicial or legislative rather than administrative action shall be taken. In the absence of any power of suspension or removal there is little further that the governor can do directly, except as far as possible to throw the light of publicity upon the facts in the case.

The general rule governing the relations between the governor and other state executive or administrative officers is that the duties of the latter are determined by law and not by the direction of the governor. This is especially true in the case of elective officers. Where the action of such officers is necessary in order that the powers of the governor may be carried out, or in order to validate or complete any of his official acts, such officers may be compelled to act through the issuance by the courts of the writ of *mandamus*. In general, therefore, the relation between the governor and other state executive officers is a legal rather than an administrative relation.[46]

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[44] Art. V, Sect. 20.

[45] Art. V, Sect. 121.

[46] This point will be more fully considered in Ch. VI.

An important exception to this general rule, however, is found in the governor's power of removal, which, though still insignificant as compared with that of the president of the United States, has nevertheless shown signs of growth within recent years. In no respect, perhaps, does the power of the governor contrast more strikingly with that of the president than in respect to the power of removal. Although there is no special provision in the Federal Constitution in regard to the possession by the president of a power of removal, he has nevertheless exercised such a power, with the exception of a comparatively short interval, since the foundation of the government. Upon this power is based to a large extent his almost complete control over the entire national administration. By the action both of Congress and of the courts, this power has been construed as belonging to the president as growing out of and resulting from his general executive power.[47]

The state governor, on the other hand, is not considered as having any power of removal, either as a result of his general executive power, or as an incident of his power of appointment.[48] What power of removal the governor has must, as a general rule, be derived from some specific provision of the constitution or statutes. This necessity of a special grant in order that the power may be exercised has operated to prevent a rapid extension of the governor's removal power. The growth of the power has also been hindered by other causes. For example, a theory which, though now discredited,

[47] Goodnow, *Principles of Administrative Law of the U. S.*, pp. 76-77; Parsons *vs.* U. S., 167 U. S., 324.

[48] Field *vs.* People, 3 Ill., 79; Dubuc *vs.* Vess, 19 L. R. A., 210; State *vs.* Rhame, 75 S. E., 881 (1912); Nicholson *vs.* Thompson, 5 Rob. (La.), 367 (1843); McDonald *vs.* Brunett, 92 S. C., 469 (1912). But see Keenan *vs.* Perry, 24 Tex., 259 (1859), where it was said that when the tenure of an office is not fixed by the constitution or statutes and there is no provision for removal, the continuance of the incumbent in office is determinable at pleasure by the governor.

was formerly held in some quarters and even, at times, recognized by the courts was to the effect that an appointee to an office acquires a vested right thereto, and is not removable except by the methods provided in the constitution.[49] This naturally hindered the development of the governor's power of removal. It should also be noted that, in respect to local officers, the prevalence of the doctrine of home rule has stood in the way of any large extension of this power. Furthermore, during our early history, the terms of office of executive and administrative officers were usually very short, frequently extending no longer than one year. Under these circumstances there was not so much need or opportunity for the exercise of the power of removal. When the length of the terms of executive officers was specified in the constitution, as was frequently the case, such officers were removable only by the methods provided in the constitution, and, if the constitution did not give the governor the removal power in such cases, the legislature could not confer it upon him.[50] This was deemed to be especially true in the case of elective officers.[51] A more important influence, however, in hindering the growth of the governor's power of removal was the fear that it might be used for partisan purposes, and thus introduce the spoils system which obtained in the national government. A rather widespread feeling was expressed by a member of the Maryland Constitutional Convention of 1851, who declared that he was unwilling to make the tenure of competent and faithful officers dependent upon the breath of the governor. "A power," said he, "to cut short the political existence of a meritorious officer in the midst of the term for which he was appointed, by the mere

[49] Cf. Collins *vs.* Tracey, 36 Tex., 546 (1872).

[50] Cf. Commonwealth *vs.* Gamble, 62 Pa. St., 343 (1869); State *vs.* Kipp, 10 S. D., 495 (1898).

[51] See *Debates and Proceedings of the New York Constitutional Convention of 1846,* p. 157. (Atlas edition.)

ipse dixit of a party governor, was a dangerous incentive to mal-administration." [52]

In spite of these difficulties, however, it was early seen by far-sighted observers that the governor's power of removal must be extended if he is properly to be held responsible for the conduct of the administration.[53] Although their views gained headway but slowly, some progress was gradually made in extending this power to the governor. Even as early as 1776, the Maryland Constitution of that year gave the governor a considerable power of suspension and removal over certain classes of civil and military officers,[54] and in the constitution of that state, adopted in 1851, this power was continued and extended.[55] In New York the governor has usually had a larger power of removal of local officers than in other states. By the constitution of 1821 the governor of that state was empowered to remove from office sheriffs, county clerks and coroners.[56] To this list the constitution of 1846 added the district attorney,[57] and, by the same instrument, the governor was given the power to suspend the state treasurer during the recess of the legislature.[58] The governor of Pennsylvania was authorized, by the constitution of 1838, to remove at pleasure the secretary of the commonwealth.[59] The Wisconsin Constitution of 1848 copied almost verbatim the New York Constitution of two years before in giving the governor a large power of removing county officers, such as sheriffs, coroners, registers of deeds,

[52] *Debates and Proceedings of the Maryland Constitutional Convention of 1851*, i, p. 471.

[53] See remarks of Chancellor Kent and Judge Van Ness in the *New York Constitutional Convention of 1821, Proceedings and Debates*, pp. 389-390.

[54] Thorpe, *Charters and Constitutions*, p. 1699.

[55] *Ibid.*, p. 1720.

[56] *Ibid.*, pp. 2645-2646.

[57] *Ibid.*, p. 2670. See also amendment of 1874, *Ibid.*, p. 2692.

[58] *Ibid.*, p. 2662.

[59] *Ibid.*, p. 3107.

and district attorneys.[60] By an act of the New York legislature, passed in 1823, a large number of administrative officers, both state and local, were made removable from office by the senate, upon the recommendation of the governor.[61]

This brief survey will indicate that, prior to the middle of the nineteenth century, some progress had been made toward vesting in the governor a power of removal. Since that date the progress in this direction has been somewhat more rapid. An important amendment to the Michigan Constitution was adopted in 1862 as the result of the discovery that, although the state treasurer was a defaulter, the governor had no power of removing him from office. This object could be effected only by impeaching him, but, as the legislature was not in session, to do so would burden the state with the expense of an extra session. The amendment as adopted authorized the governor, during the recess of the legislature, to investigate the acts of any public officer and to remove from office for neglect of duty or malfeasance in office any state executive or administrative officer, whether elective or appointive.[62] This provision, which in substance was carried over into the constitution of 1909,[63] brought a large number of officers under the removal power of the governor, and is noteworthy in its inclusion of elective, as well as appointive, officers. Illinois, by her constitution of 1870, gave the governor power to remove any officer whom he might appoint in case of incompetency, neglect of duty or malfeasance in office.[64] The object of this provision was, in the view of the chairman of the committee of the constitutional convention,

[60] *Ibid.*, p. 4085.

[61] New York Session Laws of 1823, Ch. cxcvii, p. 244.

[62] Thorpe, *Charters and Constitutions*, p. 1960. Construed in Dullam *vs.* Willson, 53 Mich., 392 (1884); Attorney *vs.* Jochim, 99 Mich., 358 (1894).

[63] Art. 9, Sect. 7.

[64] Art. V, Sect. 12. Construed in Wilcox *vs.* People *ex rel.* Lipe, 90 Ill., 186 (1878).

who introduced it in that body, that the executive should have some power as well as responsibility. "If," said he, "the governor is first to appoint men and be held responsible for his appointments, and then, in case they should prove failures, not have power to remove them, what a ridiculous spectacle would be presented. This power of removal is for the benefit of the people and for their security and not for the glory of the executive." [65] Unfortunately, the provision is not well adapted to accomplish the object of giving the governor a comprehensive and effective control over the state administration, because it does not go far enough. In order to accomplish this object, it would be necessary that the governor be given power to remove elective, as well as appointive, executive officials. The Pennsylvania Constitution of 1873 gives the governor power to remove officers whom he can appoint, and also many elective officers "on the address of two-thirds of the senate." [66] Provisions similar to those of Illinois and Pennsylvania now exist in some other states, including Maryland, Nebraska, Colorado, W. Virginia, Arkansas and Florida.

The removal power of the governor has been extended, not only by constitutional provision, but also by legislative action. The fact that the constitution gives the governor the power to remove those officers whom he may appoint does not necessarily preclude the legislature from conferring upon the governor the power of removing other officers not appointed by him.[67] In case of officers created by the legislature, that body may authorize the governor to remove the incumbents.[68] Some

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[65] *Debates and Proceedings of the Illinois Constitutional Convention of 1870,* i, p. 748.

[66] Art. VI, Sect. 4. Construed in Lane *vs.* Commonwealth, 103 Pa. St., 481 (1883).

[67] See Hurd's *Revised Statutes of Illinois,* 1912, p. 810; and People *vs.* Nellis, 249 Ill., 12 (1911).

[68] Evans *vs.* Populus, 22 La. Ann., 121 (1870); Lynch *vs.* Chase, 55 Kan., 367 (1895); People *vs.* Stuart, 74 Mich., 411 (1899); People *vs.* Cazneau, 20 Calif., 504.

state constitutions, moreover, expressly authorize the legislature to make provision for removals from office.[69] There are many instances in which the legislatures have acted in pursuance of this power, and, as a result of such statutes, a considerable number of officers not appointed by the governor have been made removable by him in New York, Ohio, Minnesota, South Dakota, Wisconsin, Texas, Washington and other states.[70]

In spite, however, of the numerous instances where the governor may exercise the removal power, it still remains true, on the whole, that this power is rather narrowly limited. The limitations upon the power may be said to arise from two main causes: first, through withholding the grant of the power either altogether or with respect to certain classes of officers and, secondly, through placing restrictions upon the methods which must be employed in exercising the power and upon the finality of such exercise. That, in spite of constitutional and statutory provisions, the power of the governor of New York to remove from office is still seriously circumscribed is indicated by the oft-quoted statement of former Governor Hughes of that state, in his inaugural address of 1909, that there is a "wide domain of executive or administrative action over which he has no control or only slight control." [71] Governor Russell of Massachusetts declared in 1892 that "more than one hundred and twenty important executive officers are, during a tenure of office varying from three to eight years, beyond the reach and control of any executive

[69] Constitution of New York, Art. X, Sect. 7; of Ohio, Art. II, Sect. 38; of Texas, Art. IV, Sect. 25.

[70] See, for example, Consolidated Laws of New York, 1909, iv, p. 3188; Session Laws of Ohio, 1913, p. 851; General Statutes of Minnesota, 1913, p. 1269, Sect. 5724; Compiled Statutes of South Dakota, 1913, p. 426; Statutes of Washington, 1910, Sect. 8994. For further details and references, consult *American Political Science Review,* viii, pp. 623-626.

[71] *Public Papers of Governor Hughes,* 1909.

power."[72] Governor Fort of New Jersey, in his annual message to the legislature of 1909, complained that "it is humiliating for the chief executive of a great state to feel that, no matter what the cause, nor how derelict in duty a public official may be, there is no power of removal or method to remedy the condition." A striking instance of the impotence of the governor of New Jersey in this respect occurred in 1873. The police commissioners of Jersey City, who were state officers and charged by the state with the enforcement of law in that city, were tried and convicted in the county court upon indictment for conspiracy to defraud the city of public funds. The Governor, with the laudable intent of ridding the state administration of officers whose unfitness had thus been unequivocally demonstrated, undertook to remove them from office. The Supreme Court of the state, however, held that the right to remove a state officer, even for proved malfeasance in office, did not belong to the executive, that the act of removal was judicial in character and belonged only to the court of impeachment.[73] The result was that, until the cumbrous machinery of impeachment could be brought into operation, the people of the state had to endure the unedifying spectacle of the machinery of law enforcement or non-enforcement in the hands of men who not only ought to have been, but were, convicts.

The absence of the removal power in the governor is apt also to produce a serious disharmony in administration when, as sometimes happens, important executive or administrative officers serve for longer terms than does the governor himself, and may also belong to the opposite political party. A recently elected governor of New Jersey was much embarrassed to find, upon his induction into office, that his attorney-general,

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[72] Address to the Legislature, 1892, quoted by Reinch, *Readings on American State Government*, p. 4.

[73] Police Commissioners of Jersey City *vs.* Pritchard, 36 N. J. L. (7 Vroom), 101.

whom he could not remove, would hold office for a longer term than his own, and had presided over the party convention which had nominated his leading opponent in the gubernatorial campaign. Under these circumstances, it could hardly be expected that coöperation between them would be rendered easy and natural.

With regard to limitations as to the classes of officers whom the governor may remove, it is true as a general principle that he has less power of removal over elective than over appointive officers, and less over local than over state officers. It has usually been thought that, when an officer derives his authority from a source as high as that by virtue of which the governor himself acts, he should not be subject to removal by the latter, except in exceptional cases. The application of this idea has been a potent cause of disintegration in the administration, but the need for greater concentration of authority has brought a slight reaction. The doctrine, however, though not so prevalent as formerly, is still widely held.

In some states, including New York, Minnesota, Ohio, Michigan, Wisconsin and South Dakota, the governor, as already noted, has a power, varying in extent, of removing from office county, municipal and other local officers. In most states, however, the governor has little or no control, through removal, over local officers. Since the states depend, to a large extent, for the enforcement of their laws upon local officers, the activity or inaction of such officers in enforcing the law is a matter of direct concern to the state, and, in case of neglect of duty on their part, the governor should have the right to remove them.[74] In spite of this consideration, however, governors have been granted comparatively little power of removing local officers, because of the widespread feeling that the exercise of such a power would con-

[74] For a further consideration of this topic, see below, Chs. XV and XVI.

stitute a violation of the principle of home rule and local self-government. It has been held, however, that the provision of the New York City Charter, authorizing the governor to remove a borough president in the same manner as the mayor, does not violate the home rule provisions of the constitution of that state.[75] But any considerable extension of the governor's power to remove local officials would be apt to come into conflict with the principle of home rule, unless it were confined to officers whose functions primarily concern the state, rather than the locality. Local officers are more frequently elective than appointive, and it is thought by many persons that, since they are closer to the people than are state officers, the people can the better judge of their conduct in office without state interference. It is doubtless largely on account of this consideration that governors, even when possessing the power of removing purely local officers, have seldom exercised it, except in the most flagrant cases.[76]

The exercise by the governor of the power of removal may be either summary or only for cause. The exercise of this power by the President of the United States is practically always, except for officials in the classified service, of a summary character.[77] In the case of the governor, however, the possession of summary power is exceptional. It exists where the officer whom it is proposed to remove holds his office at

[75] People *vs.* Ahearn, 196 N. Y., 221 (1909). On the power of the governor of New York to remove local election officials, see *Bench and Bar,* Vol. 24 (1911), pp. 1-5.

[76] The governor of New York has seldom exercised his power of removing sheriffs and mayors, but Governor Odell removed one sheriff of Kings County, and district attorneys have occasionally been removed. In 1910 the governor of Ohio removed the Mayor of Newark, Ohio, for failing to preserve order. Under Michigan Comp. Laws, 1897, Sect. 1159, the governor may remove a mayor. Germaine *vs.* Ferris, 142 N. W., 738.

[77] R. L. Ashley, Removal of Public Officials, in McLaughlin and Hart, *Cyclopedia of American Government,* iii, p. 179.

the pleasure of the governor without specified term, as in the case of the secretary of the commonwealth of Pennsylvania, or where the statute authorizes the governor to remove without assigning reasons therefor.[78] Removal in such case may be effected through the mere appointment of the successor. In the large majority of cases, however, the constitutions and statutes conferring this power provide that it may be exercised for cause, either for any good and sufficient cause or for specified causes, such as incompetency, neglect of duty, or malfeasance in office. Where this is the case, or where the officer holds during good behavior, the important questions arise as to what methods the governor must follow in determining the existence of the specified causes and whether his determination is final or subject to review by some other body.

It frequently happens that no method is provided in the constitutions or statutes for the determination of the existence of the specified causes. Under such circumstances, it has sometimes been held that the governor may adopt such mode of procedure as he may deem proper and right, and it is not for the courts to dictate to him in what manner he shall perform the duty. Therefore, no written charge, notice or formal trial is necessary, though such may, as a matter of custom, be accorded.[79] The weight of judicial opinion, however, is to the effect that removal cannot take place "without reasonable notice, without any charge or specification, and without any hearing or opportunity given to the officer to make his defense."[80] This position is, *a fortiori,* taken by

[78] As in Compiled Statutes of South Dakota, 1913, p. 426, and in Minnesota General Statutes, 1913, p. 828. Cf. Tonart *vs.* State, 56 So., 211 (1911).

[79] Wilcox *vs.* People, 90 Ill., 186 (1878); Keenan *vs.* Perry, 24 Tex., 253 (1859); State *vs.* Cheetham, 19 Wash., 330 (1898); State *vs.* Samaulia, 33 La. Ann., 446 (1886); State *vs.* Hawkins, 44 Ohio St., 98 (1886); Trimble *vs.* People, 19 Colo., 187 (1893).

[80] Dullam *vs.* Willson, 53 Mich., 392 (1884); Page *vs.* Hardin, 47 Ky.,

the courts when the constitutions or statutes specifically require notice and hearing of charges. A recent case illustrating this point arose out of the attempt of the Governor of Wisconsin to remove from office the state commissioner of insurance and appoint his successor. The Supreme Court of Wisconsin held that, although the Governor had power to remove the commissioner from office, and although the acts of the governor within the exercise of his lawful authority are not subject to judicial review, nevertheless his power to remove a state officer is subject to the constitutional guaranty of due process of law, which requires a hearing at which the officer whom it is proposed to remove may have an opportunity to defend himself against any charges which may be brought against him.[81] It is to be noted that, in conducting such hearing or investigation, and, as a result thereof, removing from office the officer against whom the charges have been brought, the governor performs not a judicial, but an executive act as the result of a quasi-judicial proceeding.[82] Were it otherwise the governor would be estopped from performing the act, as in violation of the principle of separation of powers, or else its exercise would be surrounded with more formalities than are now required. In reviewing the action of the governor in removing an officer, the courts confine themselves to passing upon the regularity of the proceedings and to determining whether the formalities required by the constitution or statute have been complied with by him. The governor is the exclusive judge, so far as the courts are concerned, of the sufficiency of the proof of the charges, and his findings and consequent act of removal are not reviewable

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648 (1848); People *vs.* Denman, 65 Pac., 455 (1905); Commonwealth *vs.* Slifer, 25 Pa. St., 23 (1855); Benson *vs.* People, 10 Colo. App., 175 (1897); Ekern *vs.* McGovern, 154 Wis., 157 (1913). For additional cases, see *Columbia Law Review,* Vol. 13 (1913), p. 754.

[81] Ekern *vs.* McGovern, 142 N. W., 595 (1913).

[82] Matter of Guden, 171 N. Y., 529; Cameron *vs.* Parker, 2 Okla., 277 (1894).

by the courts.[83] During the removal proceedings the governor may usually suspend the officer from office either as the result of express authorization or, occasionally, as incidental to the power of removal.[84] If, as a result of his investigation of the charges, the governor decides to remove the incumbent and issues his order of removal and appoints the successor, it sometimes happens that the incumbent barricades himself in the office and refuses to be ousted. The question then arises as to the proper method of procedure for carrying the removal order of the governor into effect. Governors have sometimes attempted to use force for this purpose. Some years ago the Governor of Colorado, after a hearing of charges against the police commissioners of the city of Denver, issued an order removing them from office and appointed their successors. The commissioners, however, refused to be ousted and barricaded themselves in the city hall, gathering about them the police and fire force of the city for protection. The Governor called out the state militia to enforce his order of removal, but, the matter having been carried into the courts, it was held that the governor's power of removal did not include as an incident thereto the power to use force in ousting the incumbents and installing the successors. Where the persons removed from office by the governor still refuse actually to vacate it, the proper remedy is not the application of force by the governor; but the new appointees should institute court proceedings to oust the alleged illegal incumbents, and, if the case is decided adversely to such incumbents and they still refuse to vacate the office, the governor may then exercise force to carry out the decision of the court.[85]

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[83] Cases cited and Attorney-General *vs.* Brown, 1 Wis. 513 (1853); State *vs.* Cohen, 28 La. Ann., 645 (1876); State *vs.* Rost, 16 So., 776 (1895).

[84] State *vs.* Megaarden, 88 N. W., 412 (1901); But, *per contra* see Cull *vs.* Wheltle, 114 Md., 58 (1910).

[85] *In re* Fire and Excise Commissioners, 19 Colo., 482 (1894); Ekern *vs.* McGovern, 154 Wis., 157 (1913).

The power of the courts, in reviewing the action of the governor in removing for cause, is confined, as we have seen, to determining whether he has complied with the legal requirements as to the formalities of procedure, such as giving reasonable notice and afforded a hearing. They will not, as a rule, inquire into the question as to whether the charges adduced warrant the governor in making the removal, nor will they set aside his action on the ground that he was improperly influenced. The latter function, however, is sometimes vested in the legislature or senate. It has occasionally been held that, where the governor has the power of appointing an officer subject to the concurrence of some other body, he can remove such appointee only with the concurrence of the same body.[86] This, however, is by no means necessarily true unless it is expressly so provided by constitution or statute. Such provisions sometimes do not go so far as to require the concurrence of another body, but merely that the reasons for the removal shall be reported to such body. Thus, it is required that the governor shall file a statement of the reasons for his action in removing an officer in the office of secretary of state or transmit a report of the causes therefor to the legislature at its next session, or both.[87] Under this provision, however, no action on the part of the body to which the report is made is necessarily contemplated. The principal object of the provision appears to be to bring the light of publicity to bear upon the reasons which the governor assigns for his actions, to place him under a greater sense of responsibility, and to enable the people to judge as to the sufficiency of such reasons. In some states, however, the removal power of the governor is subject to a more real and effective check through the requirement that it can be exercised only with

[86] Finley and Sanderson, *American Executive and Executive Methods*, p. 94.

[87] Constitution of Michigan, Art. IX, Sect. 7; Session Laws of Utah, 1909, Ch. 121, Sect. 4, p. 290.

the consent of the senate. Thus, in Florida, the governor may remove for cause any appointive or elective officer not liable for impeachment, but only with the consent of the senate.[88] In New York the check upon the governor's power of removing certain officers is still more serious. In that state, with respect to a number of important officers, the governor is limited to conducting investigations and making recommendations to the senate for removal, and the real power of removal is not in the governor but in the senate. When it is proposed to remove the secretary of state, comptroller, treasurer, or attorney-general, a two-thirds vote of all members elected to the senate is required.[89] That such checks upon the removal power of the governor may operate seriously to embarrass his administration and to defeat the will of the people was illustrated in 1907 by the unsuccessful attempt of Governor Hughes of New York to remove from office the state commissioner of insurance. The Governor had been elected, following the exposure of insurance scandals, mainly to clean up such conditions. In pursuance of this popular mandate he requested the state commissioner of insurance to resign, but the latter refused to do so. After a cross-examination of the commissioner, the Governor, satisfied of his unfitness for the office, recommended to the Senate that he be removed. The Senate, however, refused to concur in the recommendation of the Governor.[90] Thus does the state business fall into a deplorable morass through the division of counsels and the lack of concentrated authority over the administration.

From this survey of the governor's removal power it will be seen that, even in the limited number of cases in which it has been granted, its exercise is usually hedged about with

[88] Constitution of Florida, Art. IV, Sect. 15; State *vs.* Johnson, 30 Fla., 499 (1892).

[89] Consolidated Laws of New York, 1909, iv, p. 3187.

[90] For documents and complete testimony in this case, see *Public Papers of Governor Hughes*, 1907, pp. 245-257 and Appendix.

restrictions which tend to hamper its free play and usefulness. Of the various means of administrative control which we have considered, the power of removal is by far the most potent. Upon the possession of this power the governor must largely base his direction and control of the administration. The potency of the power is not to be measured merely by the frequency of its exercise, for the existence of the power, as distinguished from its exercise, is one of the most efficacious means of administrative control that can be devised. The energy with which the state business is managed is largely dependent upon the extent to which this power is conferred upon the governor. Such energetic management is synonymous with good government. "Energy in the executive," said Alexander Hamilton, "is a leading character in the definition of good government. . . . A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be in practice a bad government." [91] There can be little question that a further extension of the removal power in the hands of the governor would, by giving him larger control over his subordinates upon whom he must depend for carrying on the business of the state, conduce to greater efficiency of administration. It is, of course, true that the power may be abused. Unfortunately, governors may, and sometimes do, remove administrative officers merely for political reasons. Governors sometimes institute investigations into the official conduct of subordinate officers who are politically obnoxious to them with the preconceived intention of finding, if possible, some plausible reasons for removal, which will pass muster before the public eye. To prevent the injection of political considerations into the conduct of positions which are purely administrative or ministerial in character, the governor's power of removal should probably be

[91] *The Federalist,* No. 70, pp. 466-467. (Ford's Edition.)

confined in its application to those officers the exercise of whose discretionary powers may affect the policy of the administration. If, with this limitation, the power is still abused, the true remedy for such derelictions on the part of the governor must be sought in his political responsibility to the people.

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CHAPTER V

THE GOVERNOR'S SPECIAL FUNCTIONS

There are certain miscellaneous powers, with which state governors are usually vested, that are neither legislative nor of a general administrative character. They consist of such powers as control of the state militia, pardon and reprieve, carrying on relations with the Federal Government and with other states, calling special elections, and serving as *ex officio* member of various boards and commissions. These powers may be conveniently considered together in this chapter.

Military Power.—In all of the states the governor is constituted the commander-in-chief of the state militia, and may, under certain conditions, call them into service. When in the actual service of the United States, however, they are under the command of the president. In a number of states the governor is also made commander-in-chief of the army and navy, but inasmuch as the states cannot keep troops or warships in time of peace without the consent of Congress, this power is ordinarily of no importance except in time of war. During the Civil War the military power of the state governors was greatly expanded. They acted as agents of the Federal Government in recruiting troops and sometimes appointed draft commissioners for the various counties of the state.[1] The governor is ordinarily the sole judge of the necessity for calling out the militia, and may do so on his own initiative without the request or consent of any other civil authority when he deems the conditions render it ex-

[1] See Druecker *vs.* Solomon, 21 Wis., 628 (1867).

pedient.[2] In Arkansas, however, the governor may exercise this power only when the general assembly is not in session. Probably the greatest limitation upon the governor's power in this respect is found in Tennessee, where the militia can be called into service "only when the general assembly shall declare by law that the public safety requires it." [3] This provision appears to be sufficiently stringent to paralyze the executive arm most effectively. When the occasion for calling out the militia arises, the legislature may not be in session, thus necessitating the delay of calling a special session. Even if the legislature is in session, it could not usually come to so prompt a decision in the matter as could a single executive officer. In either case, therefore, the delay in calling out the militia might be such as to endanger very considerably the peace and welfare of the commonwealth. The state of Tennessee thus loses one of the chief advantages arising from the prompt and decisive action of a single executive officer. "The command and application of the public force," says Chancellor Kent, "to execute law, maintain peace and resist foreign invasion . . . have always been exclusively appropriated to the executive department in every well-organized government on earth." [4] The legislature of Tennessee, doubtless perceiving the disadvantages of this situation, passed an act empowering the governor to call out the militia when he deems it necessary to suppress mobs and riots, but the act was declared unconstitutional by the supreme court of the state.[5]

Although the governor is commander-in-chief of the militia when in the service of the state, it is not necessary that he should command them in person. This would ordinarily be of doubtful propriety, as the governor is usually a civilian,

[2] Franks *vs.* Smith, 142 Ky., 232 (1911).
[3] Constitution of Tennessee, Art. III, Sect. 5.
[4] Commentaries, i, p. 282.
[5] Greene *vs.* State, 15 Lea (Tenn.), 708 (1885).

without extensive military experience. In Maryland and Kentucky the governor is not allowed to command in person, except with the consent of the legislature. In controlling the militia the governor ordinarily acts through an officer known in most states as the adjutant-general, who is usually appointed, and sometimes also removable, by him. Through him are transmitted the directions, rules and regulations issued by the governor relating to the organized militia or National Guard. The governor may also call out the unorganized militia, if occasion demands, and organize them. All rules and regulations issued by the governor relating to the militia are, however, subject to the limitations imposed by valid acts of the state legislature and the concurrent jurisdiction of Congress to organize and discipline the militia.[6] The state constabulary in Pennsylvania, though subject to the general provisions of the legislative act creating it, is under the practically complete direction of the superintendent, who is appointed by, and responsible to, the governor.

The purposes and objects for which the state militia may be called out, as specified in the state constitutions, are usually the same as those enumerated in the constitution of the United States, viz., to execute the laws, suppress insurrections and repel invasions. Some states also specify other objects, such as the protection of the public health (Oklahoma), the preservation of the public peace (Florida and Wyoming), the preservation of law and order (Louisiana), the suppression of riots (North Carolina), and the protection of the frontier from hostile incursions by Indians and other predatory bands (Texas). Although, as already stated, the governor may call out the militia on his own initiative, in practice this is usually not done unless such action is requested by the local civil officers of the political subdivision of the state in which disorder exists to such an extent that they

[6] Constitution of U. S., Art. I, Sect. 16; Houston *vs.* Moore, 5 Wheaton, 1.

are unable to cope with it. In recent years the most frequent use of the militia has been to quell mobs bent upon lynchings and to put down disorder incident to widespread strikes and other forms of industrial warfare. In some of these instances the power of the governor has expanded to an almost unprecedented extent. In 1903, the Governor of Colorado declared a certain portion of that commonwealth to be in a state of insurrection and rebellion, as a result of which certain persons were arrested and detained by the military authorities acting under the orders of the Governor during the continuance of the insurrection. The Supreme Court of the state afterwards held that the Governor's determination of the existence of the insurrection was not subject to review by the courts.[7] In taking this position the court was doubtless actuated in part by the desire to avoid a direct conflict which would otherwise have arisen between the judicial and executive departments of the government. Probably the most extreme expansion of the governor's military power, however, arose in West Virginia in 1912, when the commander-in-chief issued a proclamation declaring martial law within a certain district of the state, and, acting through a military commission appointed by himself, practically suspended the constitution and laws of the state and exercised almost dictatorial power within the prescribed district for a period of nearly eight months. The acts of the Governor, however, were justified by necessity and were subsequently upheld by the Supreme Court of the state.[8]

External Relations.—In respect to the relation of the states to each other, the general principle which governs the matter is that the states of the Union are foreign to each other except in so far as this condition may be modified by the

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[7] *In re* Moyer, 35 Colo., 159 (1904).

[8] See Hatfield *vs.* Graham, 81 S. E., 533; State *ex rel.* Mays vs. Brown, 71 W. Va., 527; *Ex parte* Jones, 71 W. Va., 609. For further discussion of this case, see below, p. 441.

Constitution of the United States. That instrument prohibits the states from entering into any treaty, alliance or confederation, and also prohibits them from entering, except with the consent of Congress, into any agreement or compact with another state, or with a foreign power. The terms "agreement" and "compact," as here used, have been construed to refer to "the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States." [9] Agreements which are not of this character may therefore be entered into without the consent of Congress. Just as between states in the family of nations, so between the states of the Union, the executive is the agent or organ for carrying on relations with other states, although legislative authorization or approval may sometimes be required.

The governor is thus ordinarily the official organ of communication between the government of his own state and that of any other state of the United States. A specific matter which brings the states into relation with each other is the interstate rendition of fugitives from justice. The Constitution of the United States provides that such fugitive shall be delivered up on demand of the executive authority of the state from which he fled, but fails to state upon what authority the demand shall be made, and thus no obligation is specifically placed upon any particular state officer to comply with such demand. Congress, however, has attempted to supply this omission in the Constitution by providing that it shall be the duty of the executive authority of the state to comply with the demand by causing the arrest of the fugitive and his delivery to the agent of the demanding state. The words "it shall be the duty," however, have been construed to be merely "declaratory of a moral duty," and the writ of *mandamus* will not lie to compel compliance with the

[9] Virginia *vs.* Tennessee, 148 U. S., 503.

demand.[10] The governor upon whom the demand is made may therefore refuse to issue a warrant for the arrest of the fugitive or an order for his surrender to the agent of the demanding state, for whatever reasons seem to him good and sufficient. On the other hand, the legality of the governor's action in issuing the warrant may be the subject of judicial inquiry in *habeas corpus* proceedings, although the governor determines in the first instance whether the demand is in compliance with the law, and whether the person whose return is sought is a fugitive from justice.[11]

As already pointed out, state governors may be called upon in time of war to act as agents of the United States Government in recruiting troops and for other purposes. Interference of the United States Government by force in the territory of a state is authorized by the Constitution of the United States for the purposes of guaranteeing to each a republican form of government, and protecting each against invasion and domestic violence. Action designed to effect the first two objects may be taken by the United States Government on its own initiative, but in protecting against domestic violence, it waits for application from the proper state authority. This proper state authority is the governor, provided the legislature is not in session and cannot be convened. The policy of the United States Government has generally been not to intervene in cases of domestic violence unless the need is clear, nor unless the application is made by the proper authority. On the other hand, if the interference is for the purpose of enforcing the laws of the United States, as in the case of the Chicago railroad strike in 1894, the protest of the governor against such interference is unavailing.

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[10] Kentucky *vs.* Dennison, 24 How., 66.

[11] *Ex parte* Owen, 136 Pac., 197 (Okla., 1913); on the governor's power of extradition, see also *Ex parte* Thaw, 214 Fed., 423; *Ex parte* Pettibone and *Ex parte* Moyer, 12 Idaho, 246, 250.

Pardoning Power.—Just as the governor has the power to veto the acts of the legislature, so he may virtually veto or amend the decisions of courts in criminal cases through the exercise of his power of granting pardons, reprieves and commutations. Although the pardoning power was a part of the royal prerogative in England, it has not been generally considered in this country as belonging inherently in the governor's office, and therefore an express grant of the power is necessary to its exercise. It is evidently needful that the power of pardoning or of equalizing sentences should exist in some authority, for in every system of the administration of justice, unavoidable errors and miscarriages of justice may occasionally occur, as, for example, evidence discovered subsequent to a trial may establish the innocence of a convicted man. The exercise of the pardoning power may also become desirable in order to soften the severity and rigidity of the criminal law. This was the condition of the English criminal law at the time of the separation of the American Colonies from that country, and also to a large extent of the Colonies themselves, who inherited the English common law. The severity of the criminal law both in England and in America was relieved in part through the growth of numerous technicalities of legal procedure which gave the accused every opportunity to secure his acquittal and through the refusal of juries to convict except in clear cases, and in part through the exercise of the pardoning power by the king or the governor. In relieving the severity of the criminal law, the governor acts as a sort of criminal court of equity, although his judgments and decisions are not yet based on such generally understood rules as those of equity jurisdiction, but still rest largely upon his individual conscience or caprice. The practice of different governors in granting pardons, therefore, is likely to vary just as did the measure of the Chancellor's foot. Records of precedents and settled rules for the guidance of the executive are lacking.

The old severity of the criminal law has now largely disappeared, but the technicalities of legal procedure, the wide latitude of appeal, and the possibilities of reopening the case, which were designed in part to remedy the effects of such severity, still remain. The necessity, therefore, for the existence and exercise of the pardoning power is not now so great as was formerly the case.

The pardoning power is one of the few powers, if not the sole one, of the governor, the vigorous exercise of which has not met with general approval. Complaints have frequently been made that the governor has set rascals free to roam at large, either because he has been imposed upon by designing friends or has not had the backbone to withstand the tears and entreaties of wives and relatives of the convicted man. Abuses of this sort have undoubtedly occurred not infrequently, and have given rise to the demand that the power be hedged around with such restrictions as will prevent the recurrence of such abuses. As a matter of fact, the power has seldom if ever been granted to the governor absolutely without restriction. The limitations which rest upon the exercise of the pardoning power by the governor may, in general, be classified into three groups: first, those as to the offenses to which it may extend; secondly, those as to the time when it may be exercised; and thirdly, those as to the manner of its exercise. Cases of impeachment are nearly always excepted from the governor's pardoning power, and treason is usually also excepted, and sometimes murder.[12] Where cases of treason or murder are excepted, it is usually provided that the governor may grant reprieves in such cases until the next session of the legislature. In Connecticut, the governor is given by the constitution the power of granting reprieves only, which may extend no further than the end of the next session of the general assembly.

[12] If the governor himself is under impeachment, a pardon granted by him is void. People *ex rel.* Robin *vs.* Hayes, 143 N. Y. S., 325.

Under the Constitution of the United States, the president has the power of granting reprieves and pardons without limitation as to time, that is, at any time after the offense has been committed, whether before or after conviction.[13] The states, however, have not in general seen fit to leave the governor's pardoning power thus unrestricted. The governor may ordinarily issue a pardon after conviction, or even after the sentence has been served and the prisoner has been released, but the power of "previous pardon," that is, before conviction, is granted to him in very few states. Inasmuch as a person accused of crime is presumed to be innocent until found guilty, there is something apparently illogical in pardoning him. But though there is a legal presumption of innocence, there is often a popular assumption of guilt. The main arguments in favor of the existence of the power of previous pardon are that it may be desirable to pardon subordinate accomplices in order to obtain evidence against the principal offenders and, in times of political excitement, to prevent the arrest and imprisonment of persons against whom there may be prejudice and false charges.[14] Evidence of the sort mentioned, however, may usually be obtained through promise of immunity from prosecution on the part of the prosecuting official. The exercise of the power of previous pardon is equivalent to the entry of a *nolle prosequi,* as it is called in the Maryland Constitution, and as such entry may usually be made, under certain restrictions, by the attorney-general or the local prosecuting attorney, there would seem to be no sufficient reason for giving the governor this additional power of interfering in the proceedings of criminal courts. The existence of such a power even contains the possibility of transferring the trial of many criminal cases from the courts to the governor.

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[13] *Ex parte* Garland, 4 Wall., 333.

[14] *Debates and Proceedings of the Pennsylvania Constitutional Convention of 1873,* ii, pp. 370 ff.

In the third place, restrictions rest upon the governor in regard to the manner of exercising the pardoning power. Such restrictions are designed to promote publicity and regularity of the proceedings, and to create some legal control, legislative or otherwise, over executive action. In order to avoid secret or *ex parte* proceedings on the part of the governor, it is provided in a number of states that the power is to be exercised subject to such regulations as may be provided by law relative to the manner of applying for pardons, and that all grants of pardons, reprieves or commutations shall be periodically reported, with essential particulars, to the legislature. In Maryland the governor is required to publish in the newspapers notice of each application for a pardon with the date upon which his decision will be given, and the legislature may also require him to report the reasons for his decision. In Kentucky, Texas, and other states, he is also required to file or report a statement of the reasons for his decision on each application. In Mississippi, and other states, the applicant himself is required to publish in a newspaper of the locality where the crime was alleged to have been committed a notice of his application with the reasons therefor before a pardon can be granted. There is a well grounded feeling that the people of the community in which the crime was alleged to have been committed should be notified and have an opportunity to be heard in regard to the matter. This applies in particular to the judge who presided at the trial and the district or state's attorney who prosecuted the case. This would assist in guarding the governor from imposition by enabling him to obtain information on both sides with reference to the facts of the case.

Another and more important restriction upon the governor in regard to the manner of his exercise of the pardoning power is the requirement that he may exercise it only in conjunction with some other body. Thus, in several of the New England states, the power may be exercised only

with the advice and consent of the council or senate. More usually, however, the body participating with the governor is a board, created by the constitution or by statute, and composed of *ex officio* or specially appointed members. The participation of such a board in the exercise of this power was advocated by Francis Lieber, who held that it was "best to establish by law a board of say five members, one or two of them to be judges, without the written report of which board to the governor, no pardon should be permitted, or whose consent, after full investigation of the case, should be necessary for the validity of the governor's pardon." [15] In states where such boards are created by the constitution, as in New Jersey and Pennsylvania, they are usually composed of *ex officio* members, and their consent is necessary to the valid exercise of the pardoning power. When such boards are created by statute, however, after the constitution has vested the pardoning power in the governor, as in Illinois, their functions consist merely in hearing applications for pardons and in giving advice and recommendations to the governor, which he may follow or not, as he sees fit.[16]

It is doubtful whether the time and attention of the chief executive officer of the state ought to be taken up with matters of individual application, such as pardons. The possession of this power is apt to subject him at times to political pressure and personal influences which it may be almost impossible for him to resist, and, at all events, it is usually impracticable for him, immersed in more important duties, to give to the numerous applications for executive clemency the amount of careful consideration which they deserve. Certainly the assistance of some agency, such as a board of

[15] *Reflections on the Changes Which May Seem Necessary in the Constitution of New York* (1867), p. 13.

[16] An advisory pardon board has recently been created in California, consisting of the lieutenant-governor (chairman), the attorney-general, and the wardens of the two state prisons. Session Laws of California, 1915, Ch. 260.

pardons, to sift the applications and make recommendations, is desirable. The existence of special boards, moreover, tends to bring about a greater regularity of procedure and more settled rules for the determination of the question as to whether a pardon shall be granted. The procedure before the board of pardons of Colorado is thus described by a former governor of that state: "Where a prisoner claims innocence, his case is considered at once; but where a man does not claim innocence, he must wait one year before he can make application. There is an application blank which makes him state his version of the crime, makes him state whether he has committed other crimes, whether he has been in other prisons or reformatories. There are probably a hundred questions he has to answer. When the warden gets that back, he submits it to the secretary of the board of pardons, then to the judge who tried the case, then to different witnesses who testified against the prisoner, and then the case is presented before the board of pardons. The second Friday of every month is set for the hearing of such cases. At that time the prisoner can appear, by counsel, if he desires, or by friend, and make any statement he wishes, not under oath, however, unless he so desires. After the board of pardons hears the case, pro and con, they deliberate upon the matter and report to the governor. Under the old system a prisoner could come to the governor, and he would hear one side, but heard no one on the other side; and the result was that many undeserved pardons were granted. Under this system, where both sides are heard, you can ascertain whether a man should be freed or not." [17] Thus the participation of boards is beginning to give to the granting of pardons something of that definiteness and regularity of procedure which equity jurisdiction long ago acquired through the accumulation of precedents. Pardoning boards give a

[17] Ex-Governor Shafroth, in *Governors' Conference Proceedings*, 1912, p. 33.

quasi-judicial character to the process of sifting applications, and that they are generally better qualified than the governor to act upon them is tacitly admitted in the usual practice of governors in following the recommendations of such boards, even though legally they are merely advisory.

The power of pardon is sometimes expressly vested to some extent in the legislature as well as in the governor. Thus, the legislature may pardon for treason when the governor merely has the right to reprieve for this offense. There is a difference of opinion, however, as to whether the grant of the power of pardon to the governor operates to exclude the legislature from any participation in it. Such is probably the effect usually with respect to acts of individual application, except in the case of the remission of fines and forfeitures, but the legislature may by law make general rules extending pardon to a number or class of persons through amnesty, or commuting the sentences of prisoners under certain conditions through the enactment of laws providing for shortening of terms for good behavior. Such "good time," however, which is tantamount to conditional commutation of sentence, may be forfeited by particular prisoners whose behavior, in the judgment of the prison authorities, has not been good.

When the governor is vested with the general power of pardon, he may exercise it, under the common law, so as to grant either absolute, limited, or conditional pardons.[18] The right to grant conditional pardons is also sometimes expressly recognized in the constitutions,[19] and the governor is sometimes also authorized to transfer prisoners from the penitentiary to the reformatory. The difficulties encountered by governors in granting conditional pardons consist

[18] Provided the conditions are not illegal, immoral or impossible of performance. See *Ex parte* Wells, 18 How., 307.

[19] Constitution of Ohio, Art. 3, Sect. 11; Constitution of Oklahoma, Art. 6, Sect. 10.

principally in determining whether the person to whom such a pardon has been granted is observing the conditions, and in getting him back into custody if he is not. The general rule is that the questions as to the identity of the prisoner and whether he has broken the conditions can only be determined by judicial action, though such action is not always had, and it has been held that, under a parole accepted by a convict, the governor can order him remanded without notice or opportunity to be heard.[20] In 1899 Governor Stanley of Kansas inaugurated a system of conditional pardons in that state. He released a number of prisoners on the condition that they should seek employment, refrain from gambling and the use of intoxicating liquor and report monthly to the warden. The results, he claimed, showed at least a partial success.[21] On the whole, however, the exercise of this power by the governors has not met with much success, and, in some cases, has been a flat failure. Former Governor Hoadly of Ohio declared that, of twenty conditional pardons granted by him, the conditions were observed in only one case.[22]

The exercise by the governor of the power of conditional pardon has become less necessary with the introduction in a number of states of the indeterminate sentence and the parole system. The latter system is similar to the conditional pardon of the governor, but differs from it in that the prisoner on parole is considered to be still in the legal custody of the prison authorities or of the parole board, who may remand him into actual custody at any time, and also in that prisoners convicted of certain crimes are sometimes excepted from the operation of the parole system. The advantage of the parole system over the method of conditional pardon by the gover-

[20] *Ex parte* Horine, 148 Pac., 825 (Okla., 1915).

[21] *Proceedings of the National Conference of Charities and Correction*, 1900, p. 408.

[22] *Ibid.*, 1886, pp. 77 ff.

nor lies in the fact that, as actually administered, it provides more effective means of determining what prisoners should be placed on parole, and more effective supervision over them while on parole. In view of this fact it is doubtful whether the governor ought to exercise his power of conditional pardon, and, *a fortiori,* his power of absolute pardon, except in very unusual circumstances, in the case of a prisoner to whom the parole system may be applied.

The effects of the exercise by the governor of his power of absolute pardon are either direct or indirect. The direct effects are not only to liberate the prisoner, but also usually to restore to him most of those political and civil rights of which his conviction automatically deprived him. Indirect and more remote effects, however, may also sometimes be sought by the governor through the exercise of this power. A governor opposed to capital punishment as a general proposition might defeat the law of the state on this subject by pardoning absolutely all persons convicted of capital offenses. Governor Dunne of Illinois granted a reprieve to a man sentenced to be hanged for murder, not because there was any doubt as to his guilt, but with the object of securing from the sheriff in charge definite assurance that the execution would be carried out in as orderly, decent and private a manner as possible. Some governors have exercised the pardoning power to such an excessive extent as to amount almost to a general jail delivery. Thus a former governor of South Carolina pardoned over 400 persons in two years, but the record is probably held by the governor of Arkansas, who, in 1913, pardoned 360 convicts in one day. In both cases the object was ostensibly to break up the contract or lease system of working prisoners. However desirable such a result might be, it hardly seems justifiable for the governor to pervert the pardoning power from its proper use in order to accomplish such ulterior results.

Miscellaneous Functions.—Among these may be mentioned

the calling of special elections and serving as *ex officio* member of various boards and commissions. Just as the governor is frequently empowered to fill vacancies in appointive offices, so in the case of elective offices, he is similarly authorized to issue writs of election appointing a day to hold a special election to fill such vacancy. This is the ordinary procedure in the case of vacancies occurring in the state legislature and in the House of Representatives at Washington. Under the seventeenth amendment to the Constitution of the United States, the governor may cause vacancies in the senate to be filled by special election, or may by law be authorized to fill them by temporary appointments. In the case of vacancies occurring in some state elective offices, such as judges of state courts, the governor may cause them to be filled either by calling special elections or making appointments, according to whether the unexpired portion of the term is more or less than a given period of time.[23] The governor's power of calling special elections may sometimes extend to elections other than those for the selection of public officers. Thus, upon the petition of the voters of an unorganized county in a state, the governor is sometimes authorized to call a special election for the organization of such county.[24]

As already pointed out, the legislature may confer upon the governor functions in addition to those conferred upon him by the Constitution, provided they are not inconsistent with the proper performance of his executive duties.[25] In pur-

[23] See, for example, Hurd's *Revised Statutes of Illinois,* 1911, Ch. 46, Sect. 131.

[24] South Dakota Compiled Statutes, 1913, p. 196.

[25] Thus, the governor is sometimes authorized by act of the legislature to entertain a petition for the creation of a new county, and to determine, or to appoint a commission to investigate and determine whether, in the case of counties, cities or villages petitioning for organization or incorporation, the requirements of the Constitution and statutes have been complied with, and to issue his proclamation accordingly. State *ex rel.* Marrero *vs.* Ehret, 65 So., 871; State *vs.* Ansel, 78 S. C., 331; City of Jackson *vs.* Whiting, 84 Miss., 163.

suance of this power, the legislature has vested numerous miscellaneous functions in the governor, among which is that of serving *ex officio* on various state boards and commissions. In the New York Constitutional Convention of 1846, the proposition was brought forward that the "governor shall not be eligible, during his term, to hold any other trust or public office." To this Samuel J. Tilden objected on the ground that it would prevent the governor from serving *ex officio* in various capacities.[26] The convention rejected the proposition, but a similar provision has found its way into a number of state constitutions.[27] The courts, however, in construing these provisions, have not taken the view of Mr. Tilden, but have held that an act of the legislature authorizing the governor to serve as an *ex officio* member of a state board does not in fact operate as an appointment to a different office, but merely prescribes an additional duty to be performed by him as governor.[28]

The tendency towards vesting in the governor various *ex officio* functions has been accentuated in Nebraska on account of the constitutional provision that no executive state office other than those provided for in the Constitution shall be continued or created, but that the duties devolving upon officers not provided for by the Constitution shall be performed by the officers therein created.[29] The legislature attempted to create a railroad commission, but the act was held unconstitutional by the supreme court of the state. The court, however, intimated that the legislature might constitutionally designate existing executive state officers to act as railroad commissioners.[30] Subsequently, in 1887 and 1899

[26] *Debates,* pp. 167-168.

[27] E. g., Constitution of Illinois, Art. V, Sect. 5; Constitution of West Virginia, Art. VII, Sect. 4.

[28] Bridges *vs.* Shallcross, 6 W. Va., 562; State *vs.* Potterfield, 47 S. C., 75; Arnold *vs.* State, 71 Tex., 239.

[29] Constitution of Nebraska, Art. V, Sect. 26.

[30] *In re* Railroad Commissioners, 15 Neb., 679 (50 N. W., 276), 1884.

respectively, the legislature created the offices of state labor commissioner and state food commissioner, but imposed the duties of these offices upon the governor, with power to appoint a special deputy to assist him in discharging them. These acts were upheld by the court as not in violation of the beforementioned constitutional provision.[31] The result of this inhibition of the Nebraska Constitution is that the legislature of that state is practically forced into the adoption of a type of state administrative organization containing possibilities, at least, of a high degree of centralization and concentration. If the governor is a member of almost every state commission and is himself the official head of many such bodies, even though the actual work is performed in his name by a deputy, he is in a much more advantageous position to supervise and coördinate the activities of these bodies than is ordinarily the case in most states. In order that he might maintain an effective supervision over them, however, it would be necessary that they be reduced in number through the process of abolition or consolidation of related services.[32]

The Conference of Governors.—This body, sometimes called the House of Governors, first met in 1908 upon the call of President Roosevelt for the purpose of considering the question of the conservation of natural resources. Annual conferences have since been held, attended by governors, governors-elect and ex-governors, for the consideration of various questions of common interest to the states. The conference was originally hailed with enthusiasm as a body which, though

[31] State *vs.* Eskew, 64 Neb., 600; State *vs.* Cornell, 60 Neb., 276; Merrill *vs.* State, 65 Neb., 509; *In re* Appropriations for Deputy State Officers, 25 Neb., 662.

[32] It may be noted in this connection that under the charter of the Illinois Central Railroad (Illinois Private Laws, 1851, p. 71) the governor of Illinois is made a sort of state railroad commissioner with reference to this company through his power to pass upon the correctness of the accounts of the railroad in order to determine the amount of the 7 per cent gross receipts tax. State *vs.* Illinois Central Railroad Company, 246 Ill., 188.

entirely extra-constitutional and extra-legal, would prove to be an important influence in increasing the efficiency of the state governments, bringing about greater uniformity of state action, and acting as a bar against the encroachments of centralization and "New Nationalism." Unfortunately, these high hopes have not been fully realized. Uniformity of legislation was one of the original objects of the Conference. In this direction it has effected some improvement in state divorce laws, but, on the whole, much less has been accomplished by it in promoting uniformity of legislation than by the American Bar Association and the Commission on Uniform State Laws. In the direction of defending the states against the encroachments of national centralization, the Conference has done little except to exert some influence on the Supreme Court of the United States in the Minnesota Rate Case.

The comparative failure of the Governors' Conference appears to be due partly to the short terms of most governors and the consequent changing of membership of the Conference and lack of sustained interest in the proceedings, partly to the social and unbusiness-like character of the poorly attended meetings, but more particularly to the lack of the proper sort of a permanent and efficient central organization. The Conference has now cut loose from the guidance of the national authority and has the nucleus of a central organization in its continuing secretary, but his functions consist principally in arranging for the annual meetings and in editing the annual volume of *Proceedings*. The central organization should have sufficient financial support so that it might be of use to the governors all the year round in serving as a national clearing-house of information regarding important matters of legislation, court decisions, and administrative action in the various states. In spite of the apparent paucity of positive results, however, the intangible value of the Conference may easily be underestimated. It will prove to be a useful

adjunct in the consideration of the workings of the state governments, even if it fulfills no other function than serving as a means for the interchange of views and ideas and of information regarding the results of state experience.

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CHAPTER VI

STATE OFFICERS AND HEADS OF DEPARTMENTS

State officers are to be distinguished from local officers on the one hand, and from state employees on the other. State officers are usually defined as those whose functions are coëxtensive with the state, or to whom is delegated the exercise of a portion of the (so-called) sovereign power of the state, while the functions of local officers are ordinarily confined to the territorial limits of particular political subdivisions of the state.[1] The tenure of state employees rests upon contract while that of state officers does not. In the language of the Constitution of Illinois, "an office is a public position created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed. An employment is an agency, for a temporary purpose, which ceases when that purpose is accomplished." [2]

Lieutenant-Governor.—Next in rank to the governor among state officers stands the lieutenant-governor, an officer found in about thirty-five states. He is elected at the same time as the governor and the same qualifications are usually prescribed for him. He may be classed as an executive officer with normally legislative functions. He succeeds to the office of governor in case of the latter's death, resignation, impeachment, disability, and, in some states, during the governor's absence from the state. It has been held, however, that the

[1] 36 *Cyclopedia of Law and Procedure,* 852; People *vs.* Evans, 247 Ill., 547.

[2] Art. V, Sect. 24,

lieutenant-governor does not succeed in case of the governor's temporary absence, unless such absence affects injuriously the public interest.[3] When succeeding to the governorship, the lieutenant-governor comes into possession of the former governor's rights, duties, powers, and emoluments.[4] In some states it is provided that in case of vacancy in the office of lieutenant-governor, the president *pro tempore* of the senate shall succeed to that office. In case of a vacancy in the offices of both governor and lieutenant-governor, the succession is usually the same as in states which have no lieutenant-governor, viz., the president of the senate succeeds and, after him, the speaker of the house.[5]

Except in case of succession to the governorship, the rôle which the lieutenant-governor plays is a relatively insignificant one. He presides over the senate, but ordinarily has no part in the deliberations of that body, and no vote except when the senate is equally divided. On this account, the lieutenant-governor is sometimes regarded as a mere fifth wheel to the cart, which might as well be dispensed with. On the other hand, it has been proposed that the office be rehabilitated by giving it some real power. In one or two states he is given the power to vote and take part in the debate in the committee of the whole, and this plan has been proposed in others.[6] It has also been proposed that the office of secretary of state be merged with that of lieutenant-governor, thus inducing abler men to seek it.[7] If by some such means the office could be made more attractive, there would seem to be a decided advantage in retaining it in order to provide a suit-

[3] State *vs.* Graham, 26 La. Ann., 568 (1874).

[4] It has been held that the governor has no power to revoke a pardon granted during his absence from the state by the lieutenant-governor as acting governor. *Ex parte* Crump, 135 Pac., 428.

[5] See State *vs.* Sadler, 23 Nev., 356.

[6] See Proceedings of the Illinois Constitutional Convention of 1847, *Illinois State Register*, July 20, 1847, i, No. 18.

[7] *Debates of the Louisiana Constitutional Convention of 1845*, p. 280.

able successor to the governorship in case of need. The president of the senate or speaker of the house, on account of the fact that they are elected by the voters of only a small part of the state, are not so suitable for this purpose as an officer such as the lieutenant-governor, who is elected at large and is supposed, at least, to represent the people of the whole state.[8]

A body known as the executive or governor's council, frequently found in the English colonies and under the first state constitutions, has survived in a few states, including Massachusetts, Maine, New Hampshire and North Carolina. In the last-named state it is an *ex officio* body, in Maine chosen by the legislature and in the other states elected by the people. The latter method makes it a more independent body, but in no state does it retain any considerable importance or influence.

After the lieutenant-governor and the executive council we find in most states a large body of state executive or administrative officials whose titles, duties and powers differ in different states. Although no hard and fast line of demarkation can be drawn, they may, in general, be divided into two main groups. The first group is composed of the older officers, usually provided for by the constitution and known as heads of executive departments, such as the secretary of state, attorney-general, treasurer, auditor or comptroller, and superintendent of public instruction. The members of the second group of state officers are usually provided for by statute, and have been created principally in order to deal with certain economic and social conditions which have arisen in comparatively recent years. Frequently, they are multiple in form. Among them may be mentioned banking and insurance commissioners, factory inspectors, state boards of health and industrial and corporation commissions. The first group of

[8] Cf. *Debates of the New York Constitutional Convention of 1846*, p. 168.

state officers are usually elective, while those of the second group are ordinarily appointive.

The state constitutions usually provide that the executive department shall consist of the governor, lieutenant-governor, secretary of state, attorney-general, state treasurer and one or two other officers. Some constitutions include additional officers. Thus, that of Oklahoma mentions the "state examiner and inspector, chief mine inspector, commissioner of labor, commissioner of charities and corrections, commissioner of insurance and other officers provided by law and this constitution." [9] Where the constitution specifies that the executive department shall consist of certain officers without adding the words, "and such other officers as may be provided by law or this constitution," it might be supposed that the legislature would be unable to create any additional executive officers, no matter how much they might be needed, but all subsequent duties would have to be placed upon the existing officers *ex officio*.[10] Except in Nebraska and Arkansas, however, where there are special constitutional prohibitions against the creation of additional officers, the courts have not generally taken this view.[11] Thus, it has been held that the constitutional provision as to what constitutes the state executive department does not limit the executive officers of the state to those mentioned in such provision.[12] The purpose of such a provision, it has been held, is to provide for such officers as the framers of the constitution deem indispensable, leaving to

[9] Art. VI, Sect. I.

[10] This view was taken by Mr. Haines in the Illinois Constitutional Convention of 1870. See *Debates*, i, p. 760.

[11] In Arkansas, the constitution merely prohibits the legislature from creating any *permanent* state office not provided for in the constitution (Art. XIX, Sect. 9). Consequently, the legislature has the right to determine when a temporary office is required, and the act of 1913 (Ark. Session Laws, 1913, p. 465, Sect. 1), creating a state banking department, was held not to be in violation of this section. Greer *vs.* Merchants and Mechanics Bank, 169 S. W., 802.

[12] State *vs.* Womach, 4 Wash., 19 (29 Pac., 939).

the legislature the creation of new officers when they become necessary.[13]

Secretary of State.—The state executive officer, known as the secretary of state or the secretary of the commonwealth, is found in all the states. He is elected by popular vote in all the states except Pennsylvania, New Jersey, Delaware, and Maryland, in which he is appointed by the governor with the consent of the senate. The prevalent method of popular election of the secretary of state renders him practically independent of any superior administrative control, but his powers and duties are largely regulated by the constitution and statutes. Such regulation sometimes goes into rather minute detail, as in the case of the Idaho statute requiring the secretary of state to keep his office open for business during certain hours of the day.[14] So large is the control of the legislature over the secretary of state that it has even been held that the legislature may devolve on him the performance of services foreign to the office and may pay him a salary therefor in addition to his salary as secretary of state.[15]

The powers and duties of the secretary of state are of a heterogeneous character. In Massachusetts until 1863 and in New York until 1867 he acted as state commissioner of charities to the extent that he received from the local overseers or county superintendents of the poor annual reports containing such information as he might direct. In New York, Illinois and Louisiana he acted for a time as *ex officio* state superintendent of public instruction, and in Wisconsin and Oregon he was made *ex officio* state auditor. He is still frequently found as *ex officio* member of various boards and commissions. Most of his powers and duties are of a ministerial character. Thus, he is usually keeper of the public records,

[13] Parks *vs.* Commissioners of Soldiers and Sailors Home, 22 Colo., 86 (43 Pac., 542).

[14] Idaho Revised Code, Sect. 339; Seawell *vs.* Gifford, 22 Ida., 295.

[15] Melone *vs.* State, 51 Calif., 549.

archives and the state seal and custodian of public buildings, grounds, and supplies. He authenticates public acts, and is responsible for the publication and distribution of the acts of the legislature and other public documents. Specifically, he is required to countersign and seal all commissions of appointment to public office issued by the governor.[16] He usually also has important functions in connection with elections, such as receiving petitions from primary candidates, issuing certificates of nomination and election, and furnishing ballots and other supplies to be used in state elections. He compiles the election returns and publishes a state manual or "blue book."

Other miscellaneous functions which the secretary of state is frequently called upon to perform include the issuance of certificates of incorporation to companies organized under state law, the admission of foreign corporations, and the issuance of licenses to owners and operators of motor vehicles. For the performance of his services in issuing such certificates and licenses, the secretary of state receives fees, the amount of which is fixed by law. In most states he is required to pay the proceeds of such fees into the state treasury, either by a specific constitutional or statutory provision to that effect, or by a provision fixing his salary in full for all his services.[17] Although most of the services which the secretary of state is called upon to perform are of a ministerial character, there are some which involve the exercise of a certain amount of discretionary power. Thus, in Massachusetts, he may accept or reject in his discretion petitions for incorporation of charitable associations. In Oklahoma, under a statute of 1910, he may hear arguments and testimony for or against the sufficiency of an initiative petition filed with him, and his action in overruling a motion for continuance of

[16] State *vs.* Barber, 4 Wyo., 409.

[17] State *vs.* Lewis, 6 Idaho, 51, construing Constitution of Idaho, Art. 4, Sect. 19.

such hearing will not be disturbed on review by the state supreme court unless it affirmatively appears that he abused his discretion.[18] On the whole, the office of secretary of state appears to be very loosely and unsystematically organized. It appears that some of his duties, such as those relating to corporations and motor vehicles and the collection of fees, should be transferred to other officers or departments of the state government to which they are more germane. If this were done, the office might be abolished entirely and the remaining duties transferred to some other officer, such as the attorney-general.

Attorney-General.—At the head of the legal department of the state government stands the attorney-general, an officer now found in all the states. He, together with the local prosecuting attorneys, upon whom the law imposes the duty, under certain circumstances, of instituting prosecutions for the violation of state law, may, perhaps, be called the state department of justice. It is much more loosely knit and disintegrated, however, than the corresponding department of the National Government.

In more than forty states the attorney-general is now chosen at large by popular vote. In the other states he is chosen either by the governor alone, or by the governor with the consent of the senate or council, or by joint ballot of the two branches of the legislature. There is no prevailing length of tenure for the attorney-general, the term varying from one to four years, but the tendency is towards the longer period. In several instances the term of the attorney-general does not coincide with that of the governor.

In addition to removal by impeachment, provision is made in a few states for the removal of the attorney-general by special process. Thus, in New York he may be removed by a two-thirds vote of the senate, upon the recommendation of the governor. In no case can he be ousted from office ex-

[18] *In re* Initiative State Question, 26 Okla., 554 (110 Pac., 647).

cept for cause and after having received notice of the charges against him and an opportunity of defense.

The attorney-general receives a fixed annual salary from the state, which averages about $4,000, and is tending to increase. In a number of states, particularly those in which his salary is small, he is allowed various fees in addition. The generally recognized ill effects of the fee system, however, have caused a decided tendency towards the adoption of the provision, either in the constitution or by statute, that all fees collected by the attorney-general shall be turned by him into the state treasury. Since the legislatures have not, as a rule, undertaken to enumerate all his powers and duties, the attorney-general still derives some powers from the common law;[19] but most of them now depend upon constitutional or legislative enactment. These powers and duties may be classified as follows:[20]

1. *Forensic.* He appears in the Federal or state courts in all cases in which the state is a party or interested, for the prosecution of offenders against state law and to defend actions brought against state officials in their official capacity.[21] Under certain limitations, he may enter a *nolle prosequi* for lack of evidence or other cause, and thereby discontinue the proceedings. It is particularly his duty to bring actions for the enforcement of state law in those cases where the interests of the public in general are injuriously affected, but where no one individual is sufficiently interested to have standing in court. In the exercise of his discretionary power, he may fail to bring such action, or, if brought, he may fail to prosecute it vigorously or, at certain stages of the proceed-

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[19] State *vs.* Ehrlick, 65 W. Va., 700. In Fergus *vs.* Russel, 270 Ill, 304, it was held that the common law powers which the attorney-general possesses under the constitution are inherent in the office, and cannot be taken away by the legislature.

[20] *Report of Attorney-General of Pennsylvania,* 1913-4, pp. 3 ff.

[21] Cf. State *vs.* Village Council of Osakis, 128 N. W., 295.

ings, may abandon the prosecution altogether.[22] The large discretionary power thus placed in his hands is thus liable to subject him to great pressure either to deal leniently with powerful lawbreakers, or to curry favor by bringing unwarranted prosecutions against unpopular defendants.

2. *Advisory.* It is his duty, when requested, to render opinions to the governor, heads of departments and state boards upon legal questions arising in connection with their official duties. Contrary to the practice in the Federal Government, the state attorney-general is also required to give opinions upon such questions to either branch of the legislature, and, in some states, to legislative committees. In particular, he consults with and advises the local prosecuting attorneys in matters relating to their official duties. The opinions of the attorney-general are, of course, not mandatory, and it has been usually held by the courts that a state officer who acts upon what proves to be a mistaken opinion of the attorney-general does so at his own peril.

3. *Quasi-judicial,* such as the passing upon applications for suggestions to the courts that certain extraordinary writs be issued, as, for example, that a writ of *quo warranto* be issued to test the title of a person holding public office.[23] The attorney-general may hold hearings upon the question in which both sides are represented and his decision in the matter is sometimes final.

4. *Miscellaneous,* such as serving upon various state boards, among the most usual being the state board of pardons.

State boards and commissions have not infrequently been authorized to employ special counsel to conduct their legal proceedings. With the growth of such boards in number and variety of function, the legal business of the state has tended to become disintegrated, and conflicts or friction frequently arose between the attorney-general and the special counsel of state

[22] People *vs.* Spring Lake Drainage and Levee District, 253 Ill., 479.
[23] *Report of Attorney-General of New York,* 1906, p. 18 ff.

boards and between the different special counsel.[24] Even where no actual conflict arose, the lack of coöperation between the various officers entrusted with the state's legal business operated to defeat the ends of harmony and economy.[25] On the other hand, the frequent failure of local prosecuting attorneys to coöperate with state boards by prosecuting violations of the substantive law which the board is created to enforce has a tendency to cause such boards to rely principally upon special attorneys to prosecute such violations. Moreover, in the case of boards and commissions whose activities involve a large amount of litigation, the employment of special attorneys for the purpose is almost necessary. Such special attorneys, however, need not be entirely disconnected from the legal department of the state government. They should be appointed by the attorney-general, attached to his office and subject to his supervision, though under the immediate direction of the particular boards to which they are assigned. Within recent years, some states have provided by constitutional or statutory enactment that all the law business of the state shall be conducted by the attorney-general or under his direction.[26] It results, therefore, that as new activities are undertaken by the states and new boards and commissions created, the work and importance of the attorney-general's department increase correspondingly.

It still remains true, however, that the legal business of the state is largely disintegrated. This arises not only from the existence of numerous special attorneys for state boards, but

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[24] Cf. *Report of Attorney-General of New York*, 1907, p. 8.

[25] *Report of Attorney-General of Massachusetts*, 1897, p. xvi; *Report of Attorney-General of Illinois*, 1907-8, p. ix.

[26] In Fergus *vs.* Russel, 270 Ill., 304, it was held that "except where the constitution or a constitutional statute may provide otherwise, the attorney-general is the sole official adviser of the executive officers and of all boards, commissions and departments of the state government," and, consequently, an appropriation to the state insurance superintendent for the legal services of special counsel is unconstitutional and void.

also from the lack of central control over the local officers, usually called district attorneys, prosecuting attorneys, or state's attorneys, to whom is largely intrusted the conduct of the state's legal business in the localities. In the large majority of states, this officer is elected by the people of the county or other local district into which the state may be divided for this purpose. His term of office is usually either two or four years. In no case can he be ousted from office until certain formalities of a judicial or quasi-judicial character have been complied with. In some states the attorney-general may institute *quo warranto* proceedings against him in the supreme court of the state. Perhaps the most summary methods of removal exist in New York and Minnesota, where the governor alone may remove him after notice of the charges against him and opportunity of defense. This power of the governor is executive and not judicial, and his decision is not reviewable by the courts.

The prosecuting attorney appears for the state and county and prosecutes all actions, civil and criminal, in the courts of his county, in which the state or county is a party or interested. He also gives his opinion to any officer of the county upon legal questions relating to the duties of his office. He attends the grand jury for the purpose of giving them legal advice, examining witnesses, and drawing up indictments. His power of entering a *nolle prosequi* in a criminal case has, in a number of states, been considerably curtailed, and, in South Dakota, entirely abolished.

Various somewhat half-hearted attempts are made to bring the prosecuting attorneys under central control. It is frequently provided that they shall be under the direction of the attorney-general, who may exercise supervision over them as to the manner of discharging their duties, and it is made their duty to assist him in the prosecution of important cases arising in their localities. There is usually, however, no means provided for enforcing this power of direction, and friction

and differences of opinion have frequently arisen over such a question as to whether sufficient evidence exists for undertaking a particular prosecution. Under such circumstances, even though the attorney-general might require the prosecuting attorney to begin the prosecution or, when directed by the governor, take charge of the law business in the local courts, he would still be handicapped by lack of coöperation on the part of the local attorneys. A partial remedy for this condition of affairs has been fourd in some states, either by the removal of the local attorney, as in New York, Minnesota, Nebraska, Indiana and Iowa, or by a practical supersession of the local prosecuting officers by officers of central appointment and control, as in Pennsylvania, Oregon and Kansas.[27]

Financial Officers.—"The oldest state finance official is the state treasurer, who is found in every state, to receive, care for and disburse public funds. For a time this was the only state officer, the assessment and collection of state taxes being entrusted to local officials. The office of state comptroller or auditor was early established in some states; and is now provided in nearly all. Every state has a state treasurer. In most cases this officer is elected by popular vote, even in states where some of the older state officers are appointed; but in Maine, New Hampshire, New Jersey and Maryland, the treasurer is chosen by the legislature. Thus in every state, the treasurer is by law independent of the governor; and in some states this is further marked by his election at a different time or for a shorter term than the governor (as in Pennsylvania, New Jersey, Maryland, Indiana and Illinois)."

"The treasurer is by law the receiver and custodian of state revenues, and the disbursing officer for appropriations from

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[27] Oregon Session Laws, 1915, Ch. 196; Pennsylvania act of May 2, 1905 (Public Laws, 351), upheld as constitutional in Commonwealth *vs.* McHale, 97 Pa., 397 and Commonwealth *vs.* Havrilla, 38 Pa. Super. Ct., 292; Kansas Session Laws, 1901, Ch. 232, construed in State *vs.* Jepson, 76 Kan., 644.

state funds. He is placed under heavy bond to secure the state in case of loss. He is usually a member *ex officio* of various financial boards, such as boards of equalization, sinking funds and land funds; and less frequently is a member of other *ex officio* boards. In some states other miscellaneous duties not connected with finances are placed on the treasurer. Reports of receipts and expenditures are made by the state treasurer to the legislature. But these are usually brief summaries, while the more detailed statements are presented by the auditor or comptroller. The treasurer's office in most states is limited to formal and ministerial functions, controlled by the auditor or comptroller.[28] In no state does he have any duties or influence on the appropriations or revenue laws, such as forms the important work of a Finance Minister in other countries. Under the earlier laws, the treasurer was assumed to have physical possession of the state funds—and he was personally responsible for them; so that if he deposited any amounts in banks he did so at his own risk.[29] With the increase in the scale of financial transactions and the accumulation of large balances at times, the states have either provided vaults for the custody of state funds, or have authorized deposits in banks." [30]

"All of the states have made provision for auditing the receipts and payments of the state treasury; and in all the states except three a separate state officer and department has been established for this purpose. In Wisconsin and Oregon the secretary of state acts as auditor; and in New Hampshire

[28] It has been held, however, that the state treasurer has such discretionary powers as authorize him to call in question the constitutionality of an appropriation act by refusing to pay warrants drawn on him so as to secure judicial interpretation of the statute. Commonwealth vs. Mathues, 210 Pa., 372.

[29] Cf. State *vs.* Bobleter, 83 Minn., 479.

[30] The state treasurer may not deposit state money in any particular bank for even an indirect pecuniary inducement, arising by reason of his being a stockholder in the bank. People *vs.* Glazier, 159 Mich., 528.

warrants on the treasury are drawn by the governor, who annually appoints a committee of two or more members of the executive council, to audit the accounts of the state treasurer. In the other states the officer in charge of the auditing department is usually called the auditor; but the exact title varies to some extent. Usually where the title of comptroller is used the powers of the office are larger than where the title auditor is employed."

"This official is elected by popular vote in all of the states except New Jersey and Tennessee, where he is chosen by the legislature. His term in most cases corresponds with that of the state treasurer; and like that official this is sometimes for a shorter period than the governor; but in a few states the auditor has a longer term than the treasurer, as in Illinois, Minnesota and Ohio (four years) and Pennsylvania (three years). These factors serve to emphasize the independence of the office from the chief executive; but none of the states have placed the position on the basis of judicial tenure, as are the auditing officials in Great Britain and most of the countries of continental Europe. The primary function of the auditing department is to act as a check on the state treasurer; and in most states it is more important than the treasurer's office in the administration of state finances. It keeps a record of all moneys paid into or out of the state treasury, examines and adjusts claims and issues warrants or orders on the state treasury, which are the only authority to justify disbursements. It operates as a check on all the other branches of the state government to keep their expenditures within the limits of appropriations. The auditor's report usually presents a detailed statement of receipts and disbursements. In addition to these duties, other functions have been added to the office in different states. The auditor is usually a member of various financial boards. In a number of states, he receives and compiles estimates for appropriations. In some states, he has important duties in the assessment and collection

of taxes, especially in regard to corporation and inheritance taxes. In New York, Ohio and some other states he has supervision over the accounts of county and municipal officials. In some states, the auditor acts in other capacities not directly connected with the state finances. Thus in Minnesota, he is land commissioner; in Illinois, he has charge of the supervision of state banks; in Montana and Rhode Island, he acts as insurance commissioner; and in Indiana as banking and insurance commissioner."

"The powers of the state auditor or comptroller enable him to exercise some control over the accounts of other state offices and institutions, and also over the accounts of local officers relating to state funds. But until recently in most states, this has been limited to accounts dealing with the collection of state revenues and the disbursement of state appropriations; and for these has been confined to cash accounts, and to keeping expenditures within the amounts appropriated. A number of states have now made provisions for introducing more satisfactory accounting methods, both for state officers and institutions and for local officials. In some cases this has been done by increasing the authority of the state auditor or comptroller; but in some cases another officer has been created for this purpose." [31]

It is not necessary at this point to consider in detail all of the heads of various state executive departments. Some of them, such as the state superintendent of public instruction, will be considered in connection with that phase of state administration in which they are specially concerned.

An important question which bears upon the general position of all the heads of state executive departments is that as to the relation in which they stand to the nominal head of the administration, the governor. At the beginning of the history of the older state governments, the governor in some

[31] J. A. Fairlie, "Revenue and Finance Administration," in *Report of the Efficiency and Economy Committee of Illinois,* pp. 146-149.

of the states was empowered to appoint heads of executive departments. This method of selection soon gave way in practically all the states to popular election. In most of the states the older constitutional heads of departments are now generally elected by the people at the same time that the governor is elected. Not only does the governor have no control in selecting them, but he has little or no power of direction over them after they have been selected. It is true that the constitution and statutes frequently provide that the governor may request information in writing from them regarding their duties and that they shall make reports to him periodically or upon demand, but he has little power of following this up with any measures of positive control, for he has practically no power of removal, suspension, or discipline over the elective heads of departments. Moreover, he has no power over the organization of the departments. He cannot determine the number of departments, nor assign the various services to be performed to the respective departments, as these matters are regulated by constitutional or statutory provisions.

The term "executive department" is frequently used in a loose sense. Properly, it should be used to designate some fairly large and well defined division of the state administration, to which are assigned a group of reasonably homogeneous functions. Unfortunately, the state administration is not divided into large and well defined departments, but is split up into numerous arbitrarily constituted sections. Can there be said, for example, to be a state financial department when duties connected with the finances of the state are divided among the governor, state treasurer, auditor, attorney-general, secretary of state, insurance commissioner, and other officers?

It is evident, therefore, that the state administration is not organized for efficiency through the due subordination of the various ranks of an official hierarchy, but is rather or-

ganized for inefficiency on the principle of checks and balances. Although the principal state officers are formed, in one state, into a sort of cabinet to assist the governor,[32] in no state do they occupy that close and intimate relation to the governor which the corresponding officers in the National Government occupy toward the president. The executive power in the states is thus only nominally a unit. In reality, it is split up into as many independent parts as there are heads of departments.[33] In reality, it is as much organized on the collegial principle as the legislature, with the exception that there are usually no regular stated meetings of the executive authorities for deliberation and the formulation of a concerted program, but each acts, in general, separately from the others. It is somewhat as if each member of the legislature were assigned a certain division of the field of legislation in regard to which he was authorized to take action without consultation with the other members, subject only to the provisions of the constitution and laws applicable to him. So each state executive authority wields separately his own share of the executive power without regard to the activities of the other executive authorities, subject only to the constitution and statutes.[34]

In order that the executive departments of the state governments shall be even tolerably workable, it is necessary that, in order to compensate for the lack of administrative integration, some other means of control should be supplied. Such means are largely found in the control exercised over

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[32] Constitution of Florida, Art. IV, Sect. 20.

[33] Within a given state administrative department, however, the principle of centralization is, as a general rule, followed. Wyman, *Administrative Law,* p. 224. To this general rule, however, there are numerous exceptions, owing principally to administrative insubordination, due to legislative interference in administrative matters. See Cornell *vs.* Irvine, 77 N. W., 114.

[34] Cf. Barthélemy, *Le Rôle du Pouvoir Exécutif dans les Républiques Modernes,* pp. 59-61.

the heads of executive departments by the legislature and the courts.[35] Within the limitations of the constitution, the legislature may by law impose the performance of many duties upon the governor or, at their option, upon any other executive or ministerial officer.[36] Thus, it has been held that the secretary of state is bound to obey the directions of the legislature in regard to the public records in his office, he being the mere keeper of the records, subject to their orders.[37] In 1852, the legislature of Indiana passed a joint resolution directing the secretary of state to publish certain laws as soon as convenient.[38] Upon his failure to do so, the legislature undertook to secure his removal from office. On appeal to the court it was held that the legislature has the power to direct the secretary of state with regard to the proper discharge of his official duties and is the judge of the proper discharge of such duties when determining whether he shall be removed for a negligent discharge of them.[39]

The duty may be laid upon the secretary of state of countersigning and sealing the commissions of appointments made by the governor. Under these circumstances the question arises as to whether the secretary of state may refuse to countersign and seal a commission because, in his judgment, the governor had no authority to make the appointment. In some earlier cases, it was held that he might so refuse and could not be compelled by mandamus to do so.[40]

[35] The legislature sometimes attempts to provide a substitute for effective administrative supervision in securing zeal in the conduct of a department by providing that the salaries of the officers in the department shall not exceed the amount of fees collected for the services performed. See N. J. Public Laws, 1891, p. 17.

[36] Slack *vs.* Jacob, 8 W. Va., 612 (1875).

[37] Pinckney *vs.* Henegan, 2 Strob., 250 (S. C., 1848); see also People *vs.* Santa Clara Lumber Co., 106 N. Y. Sup., 624 (1907).

[38] Ind. Acts, 1852, p. 178.

[39] State *vs.* Bailey, 16 Ind., 46.

[40] People *vs.* Forquer, 1 Ill., 104 (1825).

In Indiana the legislature created the office of attorney-general and the governor undertook to fill it. Upon the refusal of the secretary of state to countersign and seal the commission, the matter was taken to the court, where it was held that the appointment of the attorney-general vested in the legislature and not in the governor. It was further held that the secretary of state was not merely secretary to the governor, occupying the relation to him of an agent to his principal, but that the office of secretary of state was created by the constitution, and he could not be compelled to perform an act which he was not bound by law to do.[41]

In later cases, however, the courts have denied the contention that the secretary of state can exercise any discretion under these circumstances, and have held that the writ of mandamus will lie to compel him to perform a ministerial act, and that he is amenable to injunction when attempting to do what he ought not to do.[42] Thus, in Louisiana, the secretary of state was required by mandamus to seal and countersign a commission signed by the governor appointing the relator sheriff of the parish of Orleans. Otherwise, said the court, the secretary of state would have a "right of supervision almost equivalent to a veto power" over the governor's acts.[43] Another case illustrating this point arose in Florida in 1891. The governor made an appointment to fill a supposed vacancy in the United States Senate, and directed the secretary of state to countersign and seal the commission, in order to complete and attest the appointment. The secretary of state refused to do so. The governor then instructed the attorney-general to institute proceedings in the supreme court to procure the writ of mandamus to require the secretary of state to countersign and seal the commission. The attorney-general also refused to do as directed. The

[41] Collins *vs.* State, 8 Ind., 344 (1856); 36 Cyc., 856.
[42] State *ex rel.* Mo., etc., Co. *vs.* Johnston, 234 Mo., 338.
[43] State *ex rel.* Bienvenu *vs.* Wrotnowski, 17 La. Ann., 156 (1865).

governor himself thereupon petitioned the court for a mandamus. It was held by the court that the countersigning and sealing of the commission by the secretary of state was a clear ministerial duty, involving no official discretion on his part, and might therefore be required of him by mandamus. The secretary of state, said the court, has no right to refuse because he deems the governor's action illegal, for the signing and sealing of the commission does not commit the secretary of state to the legality of the appointment.[44]

It thus appears that the governor may issue commands, but the heads of departments need not obey unless compelled to do so by a court of law. The relation, therefore, between the governor and the heads of departments is not an administrative but a legal relation. This is in direct contrast to the relation which exists between the President of the United States and the members of his Cabinet, and tends very seriously to disintegrate the state administration. It is an unedifying example of the bad effects of the application of the principle of checks and balances in state administration. Nevertheless, it is doubtless better that the governor should be able to exercise some control over the acts of the heads of departments through writs issued by the courts than that he should not be able to exercise any control over them at all. It is to be noted, however, that the interposition of the courts, as thus far spoken of, is confined to the requirement that heads of departments shall perform acts of a *ministerial* character when a legal interrelation exists between the acts of the governor and those required of the head of department.

When the acts of the head of department admittedly involve the exercise of official discretion, the writ of mandamus will not, as a general rule, lie to compel the performance

[44] State *ex rel.* Fleming *vs.* Crawford, 28 Fla., 441 (1891); see also State *vs.* Barber, 4 Wyo., 409 (1893); and Wyman, *Administrative Law*, pp. 220-225.

of the act.[45] In some instances, however, the governor has been held to have some power of control over the performance by the attorney-general of his discretionary duties. Thus, the attorney-general of Oklahoma was required by law to prosecute and defend actions and proceedings when requested by the governor. It was held that the governor had power to dismiss an action, brought by the attorney-general in the name of the state, and that he might himself maintain an action in the name of the state to prohibit the attorney-general from carrying on an action brought by that officer.[46]

The Kansas prohibitory liquor law authorized the attorney-general, when notified of violations of the law, to issue subpenas and examine witnesses touching its violation, and the legislature of that state had also by statute empowered the governor to require the attorney-general to prosecute or defend for the state any cause or matter in which the state is interested.[47] In view of newspaper statements of liquor law violations, the governor directed the attorney-general to subpena the writer of the newspaper article, hold an inquisition, take his testimony relative to violations, and from such testimony, if specific, base a prosecution. The attorney-general thereupon informed the governor that the matter was within his official discretion, and that the issuance of instructions, directing the attorney-general to institute prosecutions, was not within the scope of the governor's authority. The matter having been taken into court, however, it was held that the writ of mandamus would lie to compel the attorney-general to carry out the directions of the governor.[48]

Although the doctrine of these cases represents a step in

[45] State *ex rel.* Rosbach *vs.* Pratt, 68 Wash., 157, in which it was held that mandamus will not lie to compel the attorney-general to perform the discretionary duty of commencing legal actions.

[46] State *ex rel.* Haskell *vs.* Huston *et al.*, 21 Okla., 782.

[47] Kansas General Statutes, 1909, Sects. 4366, 8906.

[48] State *ex rel.* Stubbs *vs.* Dawson, 86 Kan., 180 (1911). There was, however, a vigorous dissenting opinion.

advance as compared with the former attitude of the courts, it cannot be said that the result is entirely satisfactory. It is still practically impossible for the governor to direct the attorney-general with regard to all the technical details of a prosecution, and it is only natural that an attorney-general, compelled against his will to institute a prosecution, will not push it with that degree of care and energy necessary for success. There is an obvious incongruity involved in the attempt to give the governor the power to control the discretionary acts of a head of department whom he has not appointed and cannot remove. The governor cannot exercise a real control over the state administrative officers through a mere legal power of direction, capable of being enforced only through appeal to the courts. Such control by the governor cannot be fully introduced except by granting to him the power of appointment, combined with that of discipline, suspension or removal.

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CHAPTER VII

STATE BOARDS AND COMMISSIONS

As pointed out in the next preceding chapter, state executive and administrative officials may be roughly divided into two main classes: first, the older constitutional officers or heads of departments, and, secondly, the newer statutory boards and commissions, or commissioners. We now come to the consideration of this second class. The special characteristics of particular kinds of state boards and commissions are described in connection with the functional activities of which they are the instruments. In this chapter, therefore, it will be necessary to treat only of some larger considerations which concern such boards and commissions in general.

It has long been the practice of state legislatures to appoint special or standing committees, composed of their own members, to consider matters connected with particular phases of possible legislation. With such legislative committees or commissions we are not here directly concerned, except to note that from them have sprung certain types of the executive boards and commissions, which have become such a prominent feature of state administration today. "The shortness of legislative sessions in most states, and the lack of expert knowledge and of necessary leisure on the part of the legislators themselves, sometimes led them to establish a committee or commission composed of outsiders possessing special knowledge of the subject, and able to give their whole attention to the matter in hand." [1]

[1] F. H. White, "The Growth and Future of State Boards and Commissions," *Political Science Quarterly*, xviii, p. 631.

At the beginning of the history of the states and for a considerable part of the nineteenth century, the administrative activities of the states were generally so circumscribed as to require few agencies outside of the existing state officers or heads of departments. Much of what has since become state administrative activity was then performed, if at all, by local agencies. State administrative control or supervision over many matters formerly left to the control of local authorities has been brought about, first, by the direct assumption of a former local function by the state; secondly, by establishing central administrative supervision over the local administrative authorities and over the exercise by them of administrative functions. The influence of state-wide public opinion upon the activities of local officers may also be increased through the publicity arising from investigations of local administration and reports made by state agencies. In addition, many new functions not formerly performed at all have been undertaken by the states. The assumption by the state of each successive new function has, as a rule, involved the creation of a state executive or administrative board, commission, commissioner or other similar agency, to which is intrusted the direct exercise of the function. The creation of state boards and commissions, therefore, has gone hand in hand with the development of centralization in state administration. In general, such bodies may be considered as administrative agencies created for the special purpose of enforcing or supervising the enforcement of a particular portion of the substantive law of the state.[2]

The creation of state boards and commissions began in earnest shortly after the close of the Civil War, and was largely due to the development of new conditions in the states at that period. The increasing complexity of modern social and industrial conditions, the coming into existence of new

[2] On the function of state boards and commissions in enforcing state law, see below, Ch. XVI.

and unplumbed phenomena, and the awakening sense of social solidarity, involved more and more the interference of the state for the purpose of regulating the operations of business and the processes of life. Such matters cannot be satisfactorily regulated by legislative action, and administrative control has therefore been provided.[3] The creation of state administrative agencies in the form of boards and commissions secures the advantages of specialization in public affairs and the application of technical knowledge and skill to the regulation of complex social and industrial conditions. The movement for the creation of state boards and commissions therefore rests fundamentally upon sound principle. It must be admitted, however, that, in practice, the movement has gone too far. It has sometimes been perverted for partisan purposes. Undoubtedly, in many instances, new boards and commissions have been created primarily for the purpose of supplying new offices to be filled as rewards for party services, and where such offices carry substantial salaries or official fees, they are eagerly sought after by decayed politicians and "lame ducks." [4]

The number of state boards and commissions is continually on the increase, and scarcely a legislature meets without creating several new bodies of this kind. During the first decade of the present century, the increase in the number of such bodies averaged between one hundred and two hundred annually. They are found in greatest number in the more highly developed industrial and manufacturing states. In New York and Massachusetts, the number ranges in the neighborhood of one hundred and fifty, and in Illinois there are more than a hundred. The large majority of these have

[3] The constitutional prohibition of special acts by state legislatures has possibly operated as one cause to accelerate the increase of boards and commissions, for the rules, regulations and special orders issued by the latter may, to some extent, take the place of special legislative acts.

[4] Cf. message of Gov. Baldwin of Connecticut, 1911, *Conn. Senate Journal, 1911*, p. 41.

been established during the last two or three decades. The great increase in the expenditures of state governments has also come during this period, and is undoubtedly due, in large measure, to the greater scope and extent of state activities, of which the boards and commissions are the instruments. Nevertheless, the activities of state boards and commissions have involved greater expense than the efficient performance of the functions assumed would warrant.

The range of subjects which have been brought under the administrative control or supervision of state boards is extremely wide. Among the more important matters may be mentioned revenue and taxation, charities and correctional institutions, education, public health, corporations, such as railroads, public utilities, banking and insurance, agriculture and the conservation of natural resources, public works, labor, and the civil service. The larger number of boards have to do with economic, developmental and regulative functions. The increasing complexity of industrial relations has made especially numerous within recent years the boards created for the purpose of dealing with labor matters, such as minimum wage boards, industrial commissions, and state accident commissions in connection with employer's liability and workmen's compensation laws.

It is difficult to make a thoroughly satisfactory classification of state boards and commissions. A classification, in regard to which it can only be said that it is less unsatisfactory than others, is as follows:[5] (a) industrial, such as boards of agriculture and inspectors of mines and factories; (b) scientific, such as boards of health and bureaus of labor statistics; (c) supervisory, such as railroad commissions and commissioners of insurance and banking; (d) examining boards for various professions and occupations, as dentistry, medicine, pharmacy, teaching, and the civil service; (e) educational boards and public library commissions; (f) execu-

[5] F. H. White, *loc. cit.*

tive, such as highway commissions and canal boards, engaged in carrying out particular enterprises; and (g) corrective and philanthropic, such as state boards of police and of charities and correction, superintendents of prisons and hospital commissions. This classification is made on the basis of the specific powers exercised by the commissions. It is not free from overlapping to a certain extent. According to the predominating character of their general powers, the commissions might be divided into legislative, administrative, and judicial; but here also overlapping would occur. With respect to the extent of their powers, they might be divided into coercive and advisory. Upon the basis of internal organization, without regard to powers, they might be divided into multiple boards or commissions and single commissioners.

The extent of the powers exercised by state boards and commissions varies widely. In some cases they are purely advisory, merely exercising the power of investigating and recommending, without authority to carry their recommendations into effect. All gradations of power are found between this condition and the other extreme in which the state board may, as in the case of some public utility commissions, issue mandatory orders which it has the power to enforce, or, as in the case of some state boards of health, may make regulations which enter into the details of local sanitary conditions in all parts of the state. Thus, the Louisiana State Board of Health is authorized to make a sanitary code, violations of which shall be a penal offense.[6] The New Jersey State Department of Health is empowered to enact a state sanitary code, which "shall supersede as to those matters to which it relates all local ordinances, rules and regulations and shall be observed throughout the state and enforced by all local health authorities."[7]

[6] La. Laws of 1906, no. 98: upheld as constitutional in State *vs.* Snyder, 131 La., 145.

[7] New Jersey Session Laws, 1915, Ch. 288.

The issuance of such rules and regulations by state boards, or the making of rates by public utility and railroad commissions constitutes in reality the exercise of a subsidiary legislative power. State boards and commissions may also sometimes exercise quasi-judicial powers. Thus, in conducting hearings and inquiries, the board or quasi-judicial tribunal may be empowered to administer oaths, subpena and examine witnesses, and issue subpenas *duces tecum,* requiring the production of books and papers.[8] In the main, however, the powers of state boards and commissions are administrative in character. They are primarily administrative bodies, and are therefore not hampered by the technical rules of judicial procedure. This comparative freedom from the procedural limitations which hedge about the courts makes for efficiency and promptness in administrative action. Conclusiveness of administrative determinations by state boards and commissions, however, is seldom found. In order to safeguard private rights from encroachment through arbitrary administrative action, it has usually been deemed necessary that any such action should be subject to judicial review.[9] The constitutional requirement of due process of law and the principle of separation of powers have been the grounds of many court decisions holding invalid acts of the legislature conferring broad powers upon administrative bodies. In order to avoid the danger of unconstitutionality, some states have placed in their constitutions provisions conferring powers of a quasi-legislative or judicial character upon important commissions. Even the courts, however, are more and more recognizing the fact that the promotion of the social welfare often requires a considerable scope

[8] In State *vs.* Taylor, 145 N. W., 425, however, it was held that a North Dakota act (Laws of 1913, Ch. 149), establishing a state bonding department to bond certain local officials was held invalid as an unwarranted delegation of judicial power to an administrative body.

[9] Chicago etc., Railway Co. *vs.* Minnesota, 134 U. S., 418.

of administrative action. Even when court action becomes necessary the scope of judicial review may in various ways be narrowed and that of administrative action correspondingly broadened. Thus, the courts usually decline to substitute their judgment for that of the state board in the determination of questions of public policy.[10] Moreover, judicial review may have to do merely with the methods whereby the determination of the board was reached and not with the subject matter of the determination.[11] Furthermore, it may be provided that no court appeal shall be allowed from the finding of the board upon any question of fact.[12] The scope of administrative action of a state board may also be virtually widened through the provision making it unnecessary that such board should bring prosecutions to secure compliance with the law or punish violations of it, but empowering the board to enter and enforce directly an order, which becomes the final determination of the matter unless the person against whom the order is entered appeals from such order to the proper court. In order to afford a greater degree of conclusiveness to administrative determinations while retaining a reasonable safeguard against arbitrary administrative action, it has been suggested that an appeal from the decision of such a body as a state railroad commission should be allowed only when the decision appealed from is not a unanimous one.[13]

On the side of internal organization, state boards and commissions have as yet been granted comparatively slight power. Although the boards, or their executive officers, usually have the power of appointing the administrative personnel or expert staff attached to the board, subject in some states to

[10] Public Service Gas Co. *vs.* State Board of Public Utility Commissioners, 84 N. J. L., 463.

[11] California Acts of 1913, Ch. 324.

[12] Stettler *vs.* O'Hara, 139 Pac., 743.

[13] Message of Gov. Baldwin of Connecticut, 1911, *Conn. Senate Journal, 1911,* p. 54.

civil service regulations, the number of persons in the staff, the grade or rank of each, and the amount of their compensation are matters which are usually determined by the legislature. Legislative control over boards and commissions comes about both through the general power of the legislature to create and organize such bodies and also through its power of making appropriations for the running of the state government in all its branches. Legislative appropriations for the maintenance of the executive departments, boards and commissions frequently go into great detail, specifying not only the exact salaries of each member of the staff, but also the exact sums that may be spent for each particular article that may be purchased, or for each particular class of expenditure permitted, or even for each individual item of expense that may be incurred.

It is possible, however, to discern evidences of a tendency to give state administrative agencies greater control over their internal organization. The legislature, for example, sometimes makes a lump sum appropriation for salaries and expenses, or, if the appropriations are itemized, authority is given the commission to transfer funds from one to another department of its work as need may arise. The California industrial accident commission, for example, may apportion or transfer funds among its several departments in accordance with their respective needs. All the officers and employees of this commission receive such compensation as may be determined by the commission, hold their offices during its pleasure, and perform such duties as may be imposed upon them by law or the commission. The legislature, moreover, not infrequently determines the maximum number of officers or employees and the maximum salaries to be paid them, the exact numbers to be determined by the board or commissioner. Thus, the New Jersey state commissioner of public roads is empowered to employ a staff of road inspectors not exceeding ten in number at not exceeding

a certain salary.[14] An example which still better illustrates the tendency to transfer the control of administrative organization from the legislature to the administrative agencies themselves is found in the flexibility of the law creating the New Jersey bureau of shell fisheries and the large degree of discretion allowed the board over its internal organization. Thus, this board has power to create sub-departments or divisions to take charge of the different lines of work intrusted to it. It may appoint heads or chiefs of such divisions or sub-departments and fix their salaries as well as the salaries of all its employees. Moreover, the director of shell fisheries, with the approval of the board, has the important power of abolishing any office or position under the board which, in his judgment, it may be unnecessary to retain.[15] Administrative control over such matters is undoubtedly an advance over complete legislative control, but, in the case of some matters, such as the fixation of salaries and hours of labor of the employees of state commissions, it is probable that, for the sake of uniformity, this function should be intrusted to a distinct administrative body.

The determination of the question as to whether the function to be performed shall be intrusted to a board or to a single commissioner depends, of course, upon the provisions of the constitution or statute creating the administrative agency. In the organization of the large majority of state administrative agencies, the board system has been adopted. At bottom, the prevalence of this system is probably due in large measure to a traditional fear of one-man power. Various other reasons, however, have undoubtedly actuated legislative bodies in adopting this plan. As many administrative agencies have been created for the purpose of supplying offices to be filled by party henchmen, a board was naturally preferable from this point of view, as it furnished

[14] New Jersey Session Laws, 1915, Ch. 294.
[15] *Ibid.*, Ch. 387.

a larger number of offices to be filled. Frequently, it is provided in the law that no more than a majority of the board shall be composed of members of the same political party. Ostensibly, the object of this provision is to give an appearance of non-partisanship to the board, but, in reality, it tends to facilitate the workings of a bi-partisan combination for the distribution of the offices at the disposal of the board. Sometimes the board system has been employed, not only to give representation to different political parties, but also to give representation to different sections of the state or to different religious sects. The entrance of such considerations, however, into the determination of the personnel of the board does not usually make for administrative efficiency but rather against it. On the other hand, there are sometimes deliberative functions to be performed and questions of policy to be decided by the administrative agency which may better be performed or decided by a board than by a single commissioner.

On the whole, if a choice must be made between the board and the single commissioner, the latter is, in most cases, decidedly to be preferred. The disadvantages of the board as compared with the single commissioner may be summarized as follows:[16] (a) boards are frequently composed, at least in part of *ex officio* members, who cannot be expected to give their whole attention to the work of the board; (b) where an effort is made to give representation to different sections of the state, it is difficult to get all the members together and meetings of the board are apt to be held only at infrequent intervals; (c) even when meetings are held, a board shows the weakness of a deliberative body in being unable to reach prompt decisions; (d) unless adequate salaries are paid the members of the board, they cannot usually be expected to give their whole time to the work, whereas,

[16] Cf. L. A. Blue, in *Annals of the American Academy of Political and Social Science,* xviii, p. 434 ff.

if adequate salaries are paid, this item of expense would be much greater than in the case of the single-headed department; and (e) responsibility for its actions in the case of a board is diffused over a group instead of being concentrated on one man as in the case of the single commissioner.

On the other hand, it is undoubtedly true that for some purposes, such as the formulation of rules and general policies, several heads are usually better than one. Moreover, it may sometimes happen that a board, on account of its diffused responsibility, may be more energetic in carrying out an advanced and enlightened, but unpopular, policy than a single commissioner could ordinarily be expected to be. Furthermore, through the device of gradual renewal of its membership, a board may usually be expected to pursue a more continuous policy than a single commissioner, unless the latter serves for a very long term or is regularly reappointed at the end of his term. The possibility of a continuous policy, however, is not necessarily an advantage, for the policy pursued should not be so continuous as to prevent the infiltration of new ideas and the adoption of new and advanced methods. Moreover, the device of gradual renewal of the membership of a board may prevent the governor or the appointing authority from exercising that degree of control over its policy which should belong to him, and which he might exercise more effectively in the case of a single commissioner.

It is not necessary, however, for us to come to a definite decision as to the respective merits of the two plans. In any particular case, the determination of this question would depend largely on the character of the work intrusted to the administrative agency. In most cases, a combination of these two kinds of agencies would probably be more effective in securing the ends in view. As a matter of fact, it often happens that, although a board is legally and ostensibly in charge of a given function, the actual discharge of the func-

tion is largely in the hands of a single officer, who serves as the secretary or executive officer of the board. Where the combination plan of both board and single executive officer in charge of a given function is legally and ostensibly adopted, the question arises as to what relation should be set up between the two agencies and where the line of division should be drawn between their respective powers. Although these questions can frequently be answered intelligently only in the light of the special circumstances of a particular case, it may be said in general that the working and action of the executive department is likely to be less efficient in proportion to the extent to which the executive officer is subject to the control of the board in the performance of executive duties. The executive officer should, in general, be intrusted with entire control of the executive or administrative matters connected with the department, subject only to the possibility of removal from office at stated intervals, for good and sufficient cause, by more than a mere majority of the board. He should also be appointed either by the board or by the governor. In matters requiring deliberation and the interchange of opinions and views, the participation, if not control, of the board is desirable. The moral support and aid through advice and encouragement which an able and progressive, but not meddlesome or overbearing, board may give to the executive officer cannot be wisely dispensed with. But the actual management and direction of the affairs of the department should be largely in the hands of the executive officer.

The administrative organization which has resulted from the practice of creating numerous state boards and commissions shows a lack of conscious development and of systematic planning. Endless incongruities and absurdities and lack of coördination are the natural result. The administration of the states' business has been divided into small and arbitrarily limited compartments, each under a separate board,

exercising its powers with little or no reference to the activities of other boards charged with the supervision of closely related matters. The slight regard paid in the creation of such boards to their proper inter-relation with existing agencies has tended to produce conflicts of authority not only as between the state commissions themselves but also as between state commissions and local agencies, departments or boards. Some matters may escape regulation entirely either through conflicts of authority arising from the overlapping jurisdictions of different administrative agencies or because such matters fall in a "twilight zone" between the vaguely defined jurisdictions of such agencies. Thus, the inspection of factories, sweat-shops and bakeries in cities may fall within the province of both the state and municipal departments of labor and of public health. In such cases, careful cooperation is essential to adequate regulation. But if such matters escape regulation, it is difficult to assess and fix the blame.[17]

Moreover, in the conduct of their affairs, such boards are frequently practically irresponsible inasmuch as they are subject to but slight central supervision or control by state executive authorities. It is true that, while some state boards are elective by popular vote, most of them are appointive by the governor with the advice and consent of the senate. As has been pointed out, however, the practice of providing for gradual renewal of the membership may make it impossible for a governor to appoint a majority of the board during his term of office, especially when, as not infrequently happens, his own term is shorter than those of the board members. Not only is little or no attempt made to coördinate the terms of board members with that of the governor, but the latter's power of removal of such officers is usually so restricted that it is capable of exercise only in extreme cases. The result is that, as has been frequently remarked,

[17] Cf. *Report of New York Factory Commission,* 1912, pp. 36-37; 78.

they practically constitute a fourth department of the state government, and bring about a serious disintegration in the administration of the state business. If it were not for the common control exercised over the many practically independent administrative agencies through the operations of the political party, they could scarcely be expected to work together at all.

Some of the results of the irresponsibility of state administrative agencies, due to the lack of effective control over their activities and to the pernicious effect of party politics, may be illustrated by the office of the Missouri state fish and game commissioner, which was under investigation a few years ago. It was found by the investigating committee that the commissioner had appointed as deputies men who had no qualifications except the services which they had rendered to the political party. He allowed them to travel about the state and run up an expense account, which he certified as correct, when they were really being used by him not to perform official duties, but to perform partisan services, such as getting out the party vote. The result was that the efficiency of this branch of the state service was greatly impaired, and the real work of the department, such as the discovery and prosecution of violations of the fish and game law, was neglected.[18]

As a result of its investigations, the Efficiency and Economy Committee of Illinois reached the following conclusions in regard to the administrative disintegration produced by the board system in that state:

"Under the existing arrangements inefficiency and waste necessarily arise from the lack of correlation and coöperation in the work of different offices and institutions which are carrying out similar or closely related functions. There are

[18] Report of Special Joint Committee to Investigate the State Fish and Game Commissioner to 46th Gen. Ass. of Mo., Appx. to *Missouri House and Senate Journal*, 1911, No. 56.

separate boards for each of the state penitentiaries and reformatory and for each of the state normal schools. There are half a dozen boards dealing with agricultural interests; and about a score of separate labor agencies, including four boards dealing with mining problems and eight free employment offices, each substantially independent of the rest. State finance administration is distributed between a number of elective and appointive officials and boards without concentrated responsibility. The supervision of corporations and of banks, insurance companies and public utilities is exercised by a series of distinct departments. State control of public health is divided between various boards with no effective means of coördination. Nor is there any official authority for harmonizng the work of the numerous educational agencies." [19]

With regard to the lack of effective supervision and control over the numerous boards, the findings of the Committee were as follows:

"As a result of the absence of any systematic organization of related services, there is no effective supervision and control over the various state offices, boards and commissions. It is true that the greater number of these are under the nominal supervision of the governor, through his power of appointment and removal. But the very number of separate offices makes impossible the exercise of any adequate control. To a very large extent each authority is left to determine its own action; conflict of authority between two or more offices is often possible; and if harmony and coöperation is secured it is by voluntary compromise rather than by the advice or decision of a superior authority. Under the present arrangements too many independent authorities have power to make expenditures subject to no effective centralized control or responsibility. This situation necessarily leads to waste and extravagance." [20]

[19] *Report of Efficiency and Economy Committee of Illinois*, p. 19.
[20] *Ibid.*, p. 21. These remarks apply equally to many other states.

In conclusion, the possibilities of improving the condition of affairs described above may be briefly considered. In one or two states, such as Nebraska and Arkansas, the tendency toward the disintegration of the administration is checked by constitutional restrictions upon the creation of additional boards and commissions. In many states, efficiency and economy commissions are investigating conditions and making recommendations for a reorganization of the state administration along lines of increased simplicity and efficiency. Meanwhile, a promising tendency has developed towards a consolidation of some boards and the abolition of others. There are frequently found boards which are intrusted with the exercise of functions that might be more efficiently and economically exercised by some other better organized and established agency with similar functions. Thus, the duties of the state board of barber examiners might, with increased efficiency and less expense, be performed by a bureau or subdepartment under the state board of health. There are other boards or offices that may once have served a useful purpose, but which are now useless. Thus, in Maryland, the retention of the office of state wharfinger seems to be a useless expense to the state, as it no longer has any substantial duties to perform, and should consequently be abolished. The movement toward the consolidation and abolition of boards may be said to have practically begun in New York and Massachusetts in 1901 and 1902 respectively, and has since grown with some degree of steadiness, though it has not generally kept pace with the rapid increase of administrative agencies. The abolition of boards has not had the effect of narrowing the field of state activity, but rather of creating a more centralized control over such activities, for the work of the abolished boards has usually been transferred to existing agencies. The tendency toward the consolidation of existing boards into a single central body, which takes over the functions previously exercised by the separate boards, has

recently been especially marked in connection with educational and with charitable and correctional administration.

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CHAPTER VIII

THE SELECTION AND REMOVAL OF STATE OFFICERS

Inasmuch as, in a democracy, the source of all governmental power and authority rests, at least theoretically, in the people, or in that portion of the people who have acquired the privilege of exercising political rights, the selection of all public officers rests, either directly or indirectly, upon popular authority. The people may either exercise this power directly, or may delegate it to some officer or organ of the government. In the latter case the officer or organ exercising the power of selection is in turn either elected by popular vote, or appointed by some other officer or organ of the government. The two principal methods adopted in the states, therefore, for the selection of public officers are those of election and appointment.

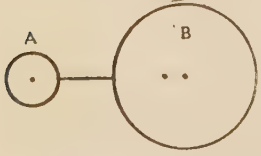
Whether election or appointment predominates as the method of forming the official relation is a question which has an important bearing upon the character of the administration. "The method of appointment," says Goodnow, "aims at administrative harmony and efficiency. The method of election endeavors to insure that popular control over the administration which is one of the fundamental principles of popular government."[1] The ideal of the elective method is self-government, while the appointive method may lead to bureaucratic government. The latter result is especially apt to be reached where a class of professional office-holders has grown up, more or less distinct from the mass of the people. From the standpoint of the personnel of the ad-

[1] *Principles of the Administrative Law of the United States*, p. 232.

ministration, the method of appointment is an internal or co-optative method of creating membership in the administration; while the elective method is largely external, that is, the selection is made by persons who are, for the most part, not themselves members of the administration.[2] In the case of elective offices, the qualifications required are usually capable of being met by a wider range of persons than in the case of appointive offices, and the idea of rotation in office is more freely applied to elective offices. The elective method, therefore, is better adapted to prevent the rise of bureaucratic government. It is to be noted, however, that election is not an absolutely external method of creating membership in the administration, because members of the administration have, of course, the privilege of voting in the election. The influence of the administrative personnel in elections, however, is greater than their proportional numerical strength would indicate. This arises largely through the control which the administration may exert over the nomination of candidates for elective offices. A president or a governor, for example, may dictate the nomination of his successor and, if the party is successful at the polls, such dictation of the nomination is practically equivalent to control of the election.[3] The administration may also fre-

[2] Cf Wyman, *Administrative Law*, p. 169.

[3] This situation may be illustrated graphically as follows: In the accompanying figure, let A = the personnel of the administration and let B = all other voters. On account of the relative numerical strength of the administrative personnel as voters, the center of gravity of the combined circles, that is, the point towards which the control of the selection of the elective officer will gravitate, will not be at the center of the circle B, but will be slightly shifted in the direction of the circle A. Should, however, the head of the administration be able to dictate the nomination and thus control the election of the officer, the center of gravity of the combined circles would be shifted so far as to rest approximately at the center of the circle A. The influence of the mass



quently select the incumbents of elective offices through its power to fill vacancies which may occur in them.

It results from what has been said that the mere fact that to the mass of voters is given the formal or nominal power of filling elective offices does not necessarily indicate that they exercise the real control over the selection of such officers. Moreover, even should the selection be in reality made by the mass of voters, the result would not be satisfactory from the standpoint of efficiency and harmony of administration. The responsibility for the selection would be diffused among the mass of the people, and, in case a bad selection should be made, no one could be specifically blamed for the choice. Moreover, the responsibility of the officer to the authority which created his membership in the administration would be to everybody in general, but to nobody in particular. An officer subject to such indefinite and diffused responsibility is seldom able to be called effectively to account for his actions. Election makes for decentralized, unconcentrated, disintegrated administration, with each officer on an independent footing, subject to little or no superior administrative control.

On the other hand, the method of appointment secures definite responsibility both upon the selecting authority for the choice of the officer and upon the officer for his official actions. It makes for centralized, hierarchical, unified administration, with each officer duly subordinated to his administrative superior. This is true, however, only where the power of appointment is concentrated in the hands of a single officer. In this case the power of appointment may be termed absolute. The state executive's power of appointment, however, is more frequently conditional, that is, dependent on the consent of some other branch or organ of the government. Thus, most of the governor's appointments

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of the voters in the selection of the officer would thus be reduced to a negligible quantity.

are subject to confirmation by the senate, or, in a few states, by the executive council. Except in the somewhat unusual case of appointive officers whose terms are fixed in the constitution, the frequency with which the governor may exercise the power of appointment to a particular office is subject to the control of the legislature through the power of the latter body to fix the length of the term. It thus appears that the appointing power of the state executive is usually subject to serious restrictions, but even if untrammeled, it would still fall short of furnishing a means of complete administrative control when unaccompanied by the power of discipline, suspension, and removal.

The methods adopted for the selection of administrative officers in the states disclose no well matured plan or logically thought-out scheme. The judgment of the American people, so far as indicated in the various laws on the subject, appears to be much confused and uncertain. The method of selection adopted in particular cases appears to be often the result of accident or else to be based on considerations other than those of administrative efficiency. The selecting authority may be either the governor alone, the governor and senate, the governor and executive council, the legislature, the courts, or the people. Some rational basis for differentiation in method doubtless exists, but there is an endless variation in the methods adopted for the selection even of officers having the same or similar duties and functions.

At the beginning of the history of the states, we find that appointment was more frequently used than election as the method of filling offices in the state executive department. Under the first state constitutions of New York, Massachusetts, and Illinois, adopted in 1777, 1780, and 1818 respectively, the governor and the lieutenant-governor were the only state executive officers placed on the elective list. Under the Ohio Constitution of 1802, the governor was the only such officer on this list, and in most of the other early

state constitutions the use of the elective method was similarly restricted. In determining the method of appointing the remaining state executive officers, however, the mistake was made of placing the power of appointment in the legislature, or, if it were vested in the governor, he was under the necessity of securing the confirmation of the senate to his appointment. Such methods of appointment led to log-rolling in the legislature, or a division of responsibility between the governor and the senate, or, in New York until 1821, between the governor and the council of appointment.[4]

The dissatisfaction with the appointive method of selecting administrative officers was also due to the so-called democratic wave which swept over the country at about the time of President Jackson's administration, and brought into operation nearly everywhere the elective principle in selecting administrative officers. Many such officers of statutory origin were made elective, and, in the various state constitutions adopted about the middle of the nineteenth century, the same principle was applied to the selection of the constitutional state officers of the executive department.[5] Thus, under the New York, Illinois, and Ohio constitutions of 1846, 1848, and 1851, respectively, most of the principal state executive officers were made elective. The selection of judicial officers was also generally brought under the same principle. The extreme to which the movement for the election of purely ministerial officers went is illustrated by the motion of Mr. Vance in the Illinois Constitutional Convention of 1847 that "there shall be elected by popular vote all the clerks required in the offices of the treasurer, auditor, and secretary of state."[6] This motion fortunately was not adopted, but

[4] Gitterman, The Council of Appointment in New York, *Political Science Quarterly,* vii, p. 80.

[5] To this general statement, however, New Jersey is an exception, for, under her constitution of 1844, which is still in force, the governor is the only elective state executive officer.

[6] Proceedings and Debates of the Illinois Constitutional Convention

the clerk of the supreme court was made an elective officer.

The idea that the election by popular vote of practically all the officers of the government is a fundamental principle of democracy and that the appointive method of selecting officers is a badge and token of autocracy became so deep-seated and widespread that any persons who opposed the idea were deemed almost guilty of lèse majesté or petty treason. Nevertheless, even at the height of the so-called democratic wave, some independent thinkers, who were comparatively indifferent to the results of their utterances upon their political fortunes, ventured to raise their voices in opposition. Thus, in the mid-century Constitutional Convention of Ohio, Mr. Archbold warned the members that "it was a syren voice that invited the people to take the immediate administration of all affairs into their own hands. . . . Some very great occasion might demand the employment of this extensive and ponderous machinery (election by the people); but to employ it on ordinary occasions would be like using a spit as big as a ten-acre field to roast a shoulder of mutton." [7] A member of the Pennsylvania Constitutional Convention of 1873, in opposing the proposition that the superintendent of public instruction be chosen by popular vote, declared that "the people are not at all times best qualified to judge of the fitness of a man for such a position," and added, "there is no case of responsibility at all attached to the people if they exercise their power of election, for the share that each one bears in the act is so small that it affects him little or nothing." [8]

The buoyant expectations of the Jeffersonian and Jacksonian democracy have undoubtedly received a severe disil-

of 1847, *Illinois State Register* (Springfield), August 14, 1847, i, No. 29.

[7] *Debates and Proceedings of the Ohio Constitutional Convention of 1850*, p 93.

[8] *Debates and Proceedings of the Pennsylvania Constitutional Convention of 1873*, ii, pp. 362-363.

lusionment. We have begun to realize that the introduction of supposedly democratic devices, such as wide extension of the suffrage, frequent elections and numerous elective officers, has given us merely the shell and husk of democracy and not the substance. In particular, it is seen that frequent elections and numerous elective officers are formulas which, however applicable they may have been at a time when the nation was homogeneous and largely rural in character, have now outlived their usefulness, and must be relegated to the scrap-pile. These devices placed such a heavy burden upon the voter that he abdicated the function which he was supposed to perform and left the selection of a large proportion of the petty and unimportant officers to the party managers and political experts. The officers remained nominally elective by the people but were in reality appointed by the political experts who controlled the nomination of candidates. The conditions were such that the average voter could not perform the functions which the elective system required of him. His position was somewhat analogous to that of the "economic man" figured by the economists of the early part of the last century, who was supposed always to act in accordance with his own economic interest, and his action would redound not only to his own interest but also to the interests of society as a whole. But in actual life this turned out not to be the case. Similarly, it was apparently supposed that the political man would exercise an intelligent choice in voting for the multitude of petty officials on the ballot. In practice, it is found that he does not do so, but in most cases contents himself with voting a straight party ticket and thereby transfers the real power of selection to the political experts who drew up the party slate.

The realization by the people of the fact that they do not really exercise any power of selection of many nominally elective officers has led directly to the movement for the short ballot. The principle of the short ballot, as formu-

lated by the National Short Ballot Organization, is as follows: "First, only those offices should be elective which are important enough to attract and deserve public interest; and, secondly, very few offices should be filled by election at one time, so as to permit adequate and unconfused public examination of the candidates." [9]

If it be asked, what officers are important enough to arouse public interest, the answer is, only those few officers at the head of the ticket whose functions involve the determination of policy. Such officers are usually sufficiently conspicuous and their relative merits are before the public eye to such an extent that the people can choose intelligently between them. In connection with the management of their offices and the performance of their functions, there may be legitimate differences of opinion as to the proper policies to be pursued, which can be appreciated by the mass of the electorate. With respect, however, to the horde of minor offices and clerical positions, which involve the performance of merely ministerial duties, there can be no legitimate difference of opinion as to the proper method of attending to such duties, capable of being appreciated by the mass of the voters, and it is absurd, therefore, to submit the choice of such petty officers to the people at the polls. The principle involved may be summed up in the phrase: When you want representation, elect; when you want administration, appoint.

"The folly of obliging the people to decide at the polls upon the fitness for office of a great number of persons lies at the bottom of almost all the misgovernment from which we suffer, not only in the cities but in the states. It is a darling device of the political jobbers and a most successful one; for, under the hollow pretense that thus the people have the greater power, they are able to crush public spirit, to disgust decent and conscientious citizens with politics, to arrange their 'slates,' to mix the rascals judiciously with a

[9] Childs, *Short Ballot Principles,* Preface.

few honest men wherever public sentiment imperatively demands that much, and to force their stacked cards upon the people." [10]

The second part of the short ballot principle, as stated above, might conceivably be carried out by retaining the existing number of elective officers, but increasing the length of their terms or increasing the frequency of elections. While an increase of the length of terms would, in many respects, prove a desirable feature in connection with the short ballot, an increase in the frequency of elections has little to recommend it. We already have too many elections, and, besides adding to the burden of public expense, a multiplication of elections would still further complicate our governmental machinery and reduce the relative amount of public interest that could be brought to bear at any given election.[11] It is a prime defect of the movement for nominations by direct primaries that it increases unduly the number and expense of elections. That device cannot be expected to attain the desired results unless combined with the principle of the short ballot.[12] There should be both a decrease in the number of elections and a reduction of the number of elective offices.

The embodiment in our forms of government of the principles of the long ballot and of the separation of powers has necessitated a stronger organization of political parties and greater activity on their part than would otherwise have been the case. The parties have assumed the functions of filling the numerous petty elective offices and of forming a connective tissue to bind together the separated departments of government.[13] Through the exercise of these functions

[10] C. Nordhoff in *North American Review,* cxiii, p. 327, quoted by Beard, The Ballot's Burden, *Political Science Quarterly,* xxiv, p. 609.

[11] See F. H. Garver, Nine Elections in One Year, *American Political Science Review,* iii, p. 433.

[12] Merriam, *Primary Elections,* p. 167.

[13] Ford, *Rise and Growth of American Politics,* p. 215.

the power of the political party has become so great as to be the controlling force in the government. It has become the power behind the throne. The ostensible government has become merely a false face to mask the real power of the political party. Hence, in order that the people may control their government, it is necessary first that they control the organization which in turn controls the government.[14] The realization of this fact has led to a movement for the democratization of the political party and the legalization of its machinery. Many of the operations of the party system have thus been brought under legislative control through the enactment of elaborate statutes. Provision is also made in many states for central administrative control of elections, through the secretary of state or through state boards of election commissioners, state boards of canvassers, or similar bodies, usually composed of *ex officio* members, which act as boards of canvass and of contest, and also sometimes appoint the county boards which in turn appoint the election officers. The multiplication of elections not only necessitates an elaborate and expensive administrative organization, but also transforms and perverts the political party into an office-controlling and distributing agency for the benefit of the party machine. The short ballot, if introduced in state elections, would tend to curtail the undue extension and to prevent to some extent the perversion of the party system in the states.

The short ballot is a device which aims in the direction of needed simplification of governmental machinery. The simpler any form of government is, the better will the people who live under it be able to understand it, and the better any people are able to understand their government, the greater control they will be able to exercise over it. Under the system of the long ballot, not only are the people unable to exercise an effective control over their government,

[14] McLaughlin, *The Courts, the Constitution, and Parties*, p. 158.

but there is a lack of concentrated responsibility for the management of the public business, without which harmony and efficiency in administration are scarcely attainable. The short ballot not only tends to increase democratic control of government, but also tends to integrate the administration by reducing the possibilities of internal friction among the administrative personnel. It thus largely reconciles the sometimes apparently conflicting principles of democratic control of government and efficiency in administration. The short ballot is at the heart of the problem of reorganizing the state administration into a small number of homogeneous departments under responsible heads in the interests of economy and efficiency.

Without the short ballot the state administration cannot have a real directing and controlling head. Furthermore, if the head of the state administration, who, under the short ballot plan, remains on the elective list, is to be justly held responsible for the conduct of public affairs, he should be vested with power commensurate with his responsibility. This would require not only that appointment should largely displace election in the selection of administrative officers, but also that the power of appointment of at least the more important of such officers should be vested solely in the head of the administration, and not made subject to the confirmation of the senate or other body.

In spite of the fact that the need of the short ballot is universally recognized by those competent to judge, its progress, especially in the state governments, is slow. In this respect they lag behind the municipalities, while the National Government always has had a short ballot. Occasional slight advances toward the short ballot in state elections, however, may be noted here and there. Thus, the state railroad commissioners and the state printer in California, the superintendent of public instruction in Iowa, and the state food and dairy commissioner in Ohio have recently been trans-

ferred from the elective to the appointive list of state officers. In Ohio and New York, however, attempts of a more general character made in 1913 and 1915, respectively, to introduce a shorter state ballot through the method of constitutional revision failed.[15] Pennsylvania and New Jersey already have a comparatively short state ballot. In the former state the secretary of the commonwealth, the attorney-general, the superintendent of public instruction, and other state officers are appointed by the governor, while in the latter the governor is the only state executive officer elected by popular vote. The principle of the short ballot, however, as applied in these states is vitiated through the existence of constitutional provisions vesting the appointment of certain state executive officers in the legislature or requiring the confirmation of the senate to the governor's appointments. If the governor were given the unconditional power of appointing all the important officers in the state administration, a mighty stride in advance towards democratic control and efficient government would be taken. But the short ballot, in and by itself, is not a panacea for all the ills of the body politic. If the governor is to be the real head of the state administration, the latter must be reorganized into a few homogeneous departments, and over the heads of these departments the governor should have not only the power of unconditional appointment, but also the powers of discipline, suspension, and removal.

Appointment and election, in themselves, merely provide for the exercise of control by the selecting authority at the time of selection, and do not usually or necessarily imply control after selection. In order that some degree of control over an officer after his appointment or election may be assured, it is necessary that there should be supplied some

[15] The proposed New York plan, however, was not a thoroughgoing application of the short ballot principle, for the attorney-general and the state comptroller were retained upon the list of elective officers.

method of terminating his membership in the administration when such a step is desired. The methods provided in the states for terminating the official relation are as various and show as little evidence of systematic planning as in the case of the methods provided for creating the relation. Among the more important ways of terminating the relation may be mentioned expiration of term; death; resignation; forfeiture; loss of qualifications; legislative removal through direct action, through impeachment, through the abolition of the office, or, practically, through failure to make the necessary appropriation for the salary; popular removal through the recall; judicial removal; and removal by administrative action.

The method of removing state officers through impeachment by the legislature is found generally in the states, except in Oregon. Impeachment may take place only for certain causes, which are specified in the constitutions and differ in different states. This method of exercising control over administrative officers is seldom resorted to, for it is too cumbrous for practical use.

Removal of state officers through the popular recall was first provided for in Oregon in 1908 and has since been adopted in a number of other, principally Western, states. It is usually made applicable only to elective state officers. Such officers cannot be held accountable by their administrative superiors, for the method of administrative removal in the states is seldom applied to elective officers. The introduction and growth of the recall, therefore, is a logical result of the practice of electing numerous state officers by popular vote. If frequently used, it would have the effect of increasing unduly the number and expense of elections, and would tend to interfere with the continuity of administration. The recall is aimed, however, at a real evil, viz.: lack of responsibility on the part of the many practically independent elective state officers, but, in most cases, it is the wrong method

of attempting to remedy the evil. The proper method of reaching the difficulty is through subjecting such state officers to adequate control by administrative superiors. The recall should not be applied to officers not properly policy-determining, for the same reason that such officers should not be elective. In the case of the head of the state administration, since he is a policy-determining officer, and since there is no administrative superior by whom he can be held responsible, the method of removal through the recall might properly be applied to him, subject to reasonable restrictions. But the responsibility of all lesser administrative officers to the popular will should be insured indirectly through the control which the people would exercise by election and recall over the head of the administration, and through the power of the latter to appoint and remove his administrative subordinates.

The short ballot, therefore, combined with administrative removal would render the recall largely unnecessary, except as applied to the head of the administration. If the short ballot is extensively introduced in state administration, it will have the effect of increasing the power of the head of the administration, because the appointment of a number of officers hitherto elective will necessarily be placed in his hands. This increase of power would not be dangerous because it would be combined with increased responsibility. But, in order to guard against the possibility of abuse of power, the recall might be made applicable to the head of the administration.

The power of removal by an administrative superior may be exercised in two ways: either summarily or by quasi-judicial process. In a centralized administration, such as that of the United States Government, summary removal is the usual method. It is largely from this power of summary removal that the president derives his power of control and direction over the Federal administrative officers and services.

In a decentralized administration, however, such as that of the states, the power of summary removal is the exception rather than the rule. Ordinarily, where the power of removal in such an administration exists at all, it can only be exercised as result of a quasi-judicial process. That is, the officer whom it is proposed to remove must be notified, before his successor is appointed, of the proceeding against him, and must be granted a hearing before the removing authority, at which the charges against him are presented, and at which he has an opportunity of defending himself against such charges.

In the state administration, therefore, even where the power of removal is granted, its exercise is ordinarily so restricted that it is of little use except in flagrant cases. Many cases occur in which the administrative machinery would work more smoothly and efficiently if certain members of the administration were separated from it. Nevertheless, no substantial charges could be brought against such members which would justify removal by the quasi-judicial method. Moreover, cases frequently occur where the exercise of the power of removal is a more drastic method of control than the situation requires. To such cases the deterrent effect of threatened removal might be applied, for the potency of removal as a means of administrative control is not to be measured by the frequency of its exercise, as its mere existence may render its exercise unnecessary. But, in order properly to handle such cases, there should be added to the negative power of threatened removal the positive powers of temporary suspension from office and of administrative discipline through demotion or similar means. These means of control, however, are seldom found in state administration. Indeed, in many cases, no power of administrative removal exists, even by the quasi-judicial method, and, under these circumstances, the governor stands off exasperatingly powerless to remedy flagrant conditions of administrative incompetence,

ineptitude, and lack of coöperation, and the administration stands divided against itself, wasting its energy through internal friction. Where, on the other hand, the power of administrative removal and discipline exists, it should be vested only in such officers as can be held, either directly or indirectly, accountable to the people for the trust imposed in them.

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CHAPTER IX

THE STATE CIVIL SERVICE

The state civil service comprises all officers and employees of the state except those engaged in the military or naval forces. Of the two principal methods of selecting such officers and employees, those of election and appointment, the former, as pointed out in the next preceding chapter, places the real selection of subordinate officers in the hands of the party machine. Hence, when unwise selections are made by the method of popular election, the people have no one but themselves to blame, for there is no one upon whom the responsibility may be officially placed. It is not the people who are at fault, but the system. It is impracticable for subordinate administrative officials to be selected by the people upon the basis of approved tests of fitness for the office, for the people lack the information upon which to base an intelligent judgment of their qualifications. Moreover, they are confined in their choice to two or more candidates who have been nominated, or selected as candidates, by the party machines upon the basis of service to the party rather than upon that of fitness for the office. Hence, the method of election by the people of all except the principal policy-determining officers is lacking in that power of discrimination, upon which any system of selection on the ground of fitness must be based. In the case of the principal policy-determining officers, or, at least, in that of the head of the administration, political control through popular election is necessary in order to insure democratic government, but, in the case of the subordinate ministerial officers and employees, the attempt to apply politi-

cal control through popular election fails for the reason that such nominally elective officers are in reality appointed by the dominant party machine or by a bi-partisan combination of political "experts." This leads to the demoralization of the spoils system. The introduction of the short ballot, therefore, is a necessary preliminary to the full introduction of the merit system of selection in the state civil service.

The mere introduction of the short ballot in the state government, however, will not in itself, of course, insure the introduction or maintenance of the merit system of selection. The method of appointment, which, under the short ballot plan, would displace that of election, would, particularly if combined with the power of removal, be conducive to that administrative efficiency which is one of the aims of the merit system of selection. This result could be expected, however, only on the condition that such powers of appointment and removal are exercised by an administrative superior who acts under a due sense of responsibility, not to any party machine, but to the people as a whole. In the absence of such a condition, the method of appointment by an administrative superior, however much to be preferred in other respects to that of popular election, may also lead to the evils of the spoils system.

During the first half of the nineteenth century, the spoils system in the United States rose to its height. This was due in large measure to the dominance of those principles which were supposed to be necessary to the maintenance of real democracy, viz., that as many officers as possible should be elective, and that there should be short terms or rotation in office, in order to prevent the establishment of a bureaucracy, or office-holding aristocracy, out of touch with the common people. This, in turn, was based on the idea that any man of ordinary ability is capable of filling a public office satisfactorily, or, in other words, that no special training for public service is necessary. This point of view was expressed

by Mr. Simmons in the New York Constitutional Convention of 1846 as follows: "He considered it not useful to the state, to have any laws or provisions based on the idea of the importance of selecting distinguished talent for office. He thought distinguished talent had done more hurt than good in the world. He thought the knowledge that was the most useful was the common every-day average sense and practical knowledge of the people; and hence he was afraid of any precocity—of any eccentric or cometic star, that might arise in the political firmament. He would prefer, he had no doubt it would be better and that the world will sometime come to it, that the mass of the people, the average bulk of the people, would be able to take turns in doing the public business. But if we went on on this principle of selecting and attaching importance to immense talent as to eligibility to office, by and by we should get at the doctrine which prevailed in monarchies, of not selecting their kings out of their own people. . . . He thought we should never really rest on the foundation of free government—a government of law as distinguished from arbitrary will—until we attached much less importance to office and came down to the opinion that we had thousands of men fit for any office; that no office required more than one occupant; and that we could take turns." [1]

As long as the tasks of government were comparatively simple, the principle of rotation in office did not, perhaps, cause serious injury. But with the assumption since the Civil War of many new economic, regulative and semi-scientific functions, the public business has become more intricate and there has developed a corresponding need for trained men in government service—men with technical knowledge and scientific skill. Economy and efficiency in the administration of the state government cannot now be secured with-

[1] *Debates in the New York Constitutional Convention of 1846* (Argus ed.), p. 220.

out trained and competent men in the civil service; and the gradually increasing extent of the functions performed by the state government render it continually more important that the merit system of securing public servants should be extended into all branches of the public service where it is feasible. The number of officers and employees in the various services, national, state, and local, has greatly increased, thus increasing the possibilities both for good and for evil involved in their selection. If there is to be a clean sweep of the purely subordinate and ministerial offices at every change of party control, it will be impossible to secure or retain the requisite training and experience in office. There is no Democratic or Republican way of building highways, inspecting factories, or maintaining the public health. Yet the efficiency of the work in the state highway, factory, and health departments has frequently been endangered through the efforts of politicians to control positions in such departments. "We see, for example, a position dealing with engineering problems filled by an ex-bartender with only a grammar school education, whose only engineering experience is engineering the campaign" of the officer who appointed him.[2] It has long been unconstitutional in time of peace to quarter troops on private individuals without their consent; but the party machine, held together by the "cohesive power of the public plunder," regularly pays its political debts by quartering its henchmen on the long-suffering taxpayers.

The realization of these evils has led, since the Civil War, to a long struggle between the reformers and the politicians over the introduction of the merit system in the selection of public servants. The agitation has been principally in respect to the Federal service, and it was there that the reformers won their first victory. This has been due in part to the greater scope and complexity of Federal functions and to

[2] Richard Henry Dana, in *Proceedings of the National Civil Service Reform League,* 1914, p. 80.

the greater number of officers and employees in the Federal service, and also, perhaps, in part to the fact that the president's power of removal has been more complete and untrammeled than that of the state governor. The Pendleton Civil Service Reform Act, passed by Congress in 1883, has served in many respects as a model for the state laws subsequently passed. State legislation on the subject may be divided into two periods, the first following immediately upon the passage of the Federal law, and being signalized by the passage of the New York law of 1883 and that of Massachusetts in the following year. A period of comparative inactivity then ensued until 1905, since when similar laws have been enacted in a number of states, beginning with Wisconsin and Illinois in 1905, followed by Colorado in 1907 and New Jersey in 1908. In 1911 the Illinois law, which had previously applied only to appointments in the state charitable institutions, was extended to practically the whole state service, and, in the following year, the Colorado law was similarly extended. In 1913, civil service statutes were enacted in Connecticut, California, and Ohio, while, in 1915, Kansas became the tenth state with such a law on her statute books. In the same year, a civil service law was enacted in Louisiana, but it applies only to state employees at the port of New Orleans.

During 1915, however, a slight reaction against civil service reform appeared in some parts of the country, the opponents of the reform making determined efforts in a number of state legislatures to repeal or weaken the civil service laws. They were most successful in Connecticut, where the law was amended so as to make its enforcement practically optional with the heads of departments. Such ups and downs are to be expected in carrying through any reform which arouses the hostility of powerful interests. Changes in the civil service laws are likely to be more frequent just before and after a change in the party control of the legisla-

ture. Even in the positive enactment of civil service laws, partisan considerations frequently enter through the insertion of so-called "blanket clauses," designed to protect the employees then in the service. The civil service laws do not embody the merit principle perfectly, inasmuch as various provisions which work against the perfect application of the principle have been inserted by way of compromise with the open opponents of such measures and with those who seek the appearance of catering to the popular demand for civil service reform, but who are in reality opposed to it.

Although, as previously pointed out, the Federal civil service law has served as a model for the state laws, nevertheless the centralized character of Federal administration, as contrasted with the decentralization in state administration, has produced a difference with respect to the relation of the civil service commission to the head or nominal head of the administration. In the Federal Government, the commission acts more or less under the direction of the president, while in the states the commission is largely independent of the governor in administering the civil service law. The state laws also differ among themselves in respect to the amount of discretion left to the commission. In some states, the laws are brief, thus leaving many details to be governed by the rules of the commission, while other laws are more elaborately detailed in character, thus leaving less to the discretion of the commission.[3]

"The state civil service laws of the United States may be divided into two groups on the basis of their scope: The first group containing those acts which apply only to the state services, and the second comprising those which extend to

[3] The authority of the commission to make rules has been held not to be a delegation of legislative power. People *vs.* Kipley, 171, Ill., 44.

From this point on, the present chapter is largely based on "A Report on Civil Service Laws," by A. C. Hanford, in the *Report of the Efficiency and Economy Committee of Illinois,* pp. 911-938.

both the state and local services. The laws applying to both state and local services may in turn be subdivided into those which centralize the administration of the entire system in the hands of a single commission, and those which divide the control between state and local civil service boards. In the first group, civil service commissions had already been established in the larger cities, and they were left to continue their work without change upon the enactment of the state law. In the second group, one notices two distinct types of administration. In New York the law applies directly to the state, counties, cities and villages, with the state civil service board in charge of the system in the state, counties and villages. In each of the forty-seven cities the law is administered by a municipal civil service commission appointed by the mayor, but subject to a slight supervisory control by the state board, which has power to disapprove of and rescind any rule established by the municipal commissioners, may remove a city civil service commissioner under certain conditions, and may, if the local authorities fail to act, provide for the appointment of commissioners and the enactment of rules. The city commission is also required to file a copy of the roster of its classified service with the state board, and must report to the latter upon request.

"In the states of Massachusetts and New Jersey there is a variation in scope, and a difference in the administration of the civil service system. The Massachusetts law applies directly to the state service and to all cities, and may be adopted in any town of over 12,000, but the work is centralized and the single state commission has charge of the whole system. In addition to its general power to provide for examinations and appointment to subordinate municipal posts, the state commission of Massachusetts has been given the extraordinary authority to approve the appointment of heads of departments and members of municipal boards made by the Mayor of Boston. The New Jersey system is similar

to that of Massachusetts, but embodies an entirely new feature in its "home rule" provision. The law applies directly to the state, but takes effect only in such cities, counties and towns and other local divisions as may adopt the same by popular vote. But as in Massachusetts, a single state commission has complete control over the administration of the state and local civil service.[4]

"The purpose of each of the state civil service laws is the same—the appointment of subordinate public employees on the basis of merit and competition, and without reference to politics. Also the organization of the several commissions and their powers and duties; the methods of examination and appointment to the classified service; probation; temporary appointments; the regulation of promotions and transfers; the certification of pay rolls; the various penalties and prohibitions to prevent appointments contrary to law, and the provisions in regard to corrupt practices are very similar in the several laws. The principal variations in state civil service legislation have been in regard to: (1) the scope of the laws; (2) the classification of the service, and the power of the commission to declare positions exempt or non-competitive; and (3) the regulation of removals from the classified service. The later laws contain features of more or less interest with respect to the keeping of efficiency records and the standardization of the service.

"(1) On the basis of scope, the state civil service acts, as already noted, may be divided into two groups: first, those of Wisconsin, Illinois, Colorado, California and Connecticut which apply only to positions in the state service; and, secondly, those of New York, Massachusetts, New Jersey and Ohio which apply to cities, counties (except Massachusetts) and other local divisions as well as to the state service. The New Jersey law of 1908 is doubtless the most efficient of the civil service laws from the standpoint of scope and the cen-

[4] Cf. Booth *vs.* McGuinness, 75 Atl., 455.

tralization of the administration and in all other respects save its elasticity in permitting exemptions from examination. It extends directly to the state service, and contains a "home rule" feature, which makes possible its adoption by any city, county or school district; but the control of the entire system is given to the state board. Such a plan involves not only a concentration of administration, but has a decided advantage in eliminating the influence of local politics over the personnel of the commission, and in producing economy by doing away with an unnecessary duplication of administrative machinery.

"The creation of separate local commissions for each of the cities or counties in a state leads to an unnecessary multiplication of machinery and additional expense, which can be avoided through centralized administration under the jurisdiction of the state commission. The supervision of local commissions and direct administration by the state commission not only leads to greater harmony in the operation of the civil service laws, but also reduces the influence of local factors opposed to the vigorous enforcement of the merit system, and thus leads to greater economy and efficiency in the local services.

"In connection with the scope of civil service laws, especial attention should be called to the fact that in Wisconsin legislative employees are under the civil service rules. This has the effect of relieving the members of the legislature from much disagreeable importunity, and of affording them more time for their regular duties.

"(2) Turning to the classification of positions under civil service, one finds a difference of practice. The civil service laws divide all of the positions in the public service into the unclassified and the classified, the former containing those places which are not under the civil service rules, and the latter such as are filled according to the provisions of the civil service law. Under the New York, Wisconsin, Illinois,

Colorado, New Jersey and Ohio acts, the classified service includes all positions in the public service, except those which are specifically mentioned in the statute as being unclassified. In Massachusetts, on the other hand, the civil service board exercises considerable discretion in determining what positions shall be classified, although it has extended the rules to practically all important places, while in California the commission may by unanimous resolution place any position in the unclassified service.

"In general, appointments to positions in the classified service are made from among the three persons graded highest as the result of a competitive examination, or by the appointment of the highest person only, as in Illinois. The Illinois provision deprives the appointing officer of any discretion, and practically places the appointing power in the hands of the civil service commission. In operation, too, this provision at times causes delay in filling vacancies—as if the first person certified declines the appointment, it is necessary to ask for another certification—and this procedure may have to be repeated several times. The certification of three names would seem to be sufficient limitation to ensure the selection of candidates technically qualified; and at the same time to give the appointing officer a reasonable discretion in considering questions of adaptability to a particular position which it is difficult to test by a general system of examination.

"There are certain places of a technical or confidential character for which competition has not been regarded as practicable, and in most of the laws the civil service board has been given considerable power to exempt a position from examination or provide for its filling upon a non-competitive test. In this respect the laws of New York, Wisconsin and New Jersey are the most liberal, as they divide the service into exempt, competitive and non-competitive classes, and give the commissioners authority to exempt additional positions from examination, or declare them non-competitive, on

the grounds that competition is impracticable. In New Jersey and Wisconsin, however, the commission must provide for a hearing in making such additional exemptions. In California the board may exempt any position from the classified service by unanimous resolution; and the Colorado, Massachusetts and Ohio laws, while more strict in regard to exemptions, do not prohibit the filling of positions without competition. Besides such general exemptions, the laws of New York, Wisconsin, Massachusetts, Colorado and Ohio also permit the civil service commission to suspend the rules in the case of a designated person, so as to allow his appointment without examination. The Illinois statute, on the other hand, is very rigid so far as exemptions are concerned; all positions in the classified service, without exception, are filled after competitive examinations, and the commission has no power to classify a place as exempt or non-competitive. In this respect the Illinois plan presents certain advantages over the New York system, where the number of exempted positions is disproportionate to the total number of offices in the classified service, and where the elasticity of the scheme makes political raids upon the civil service possible with every change of administration. On the other hand, the rigidity of the Illinois law has disadvantages, as there are some places of a highly technical character which can best be filled after a proper non-competitive test. The specification of exempt positions is more properly an administrative than a legislative function; and if exemptions are determined in the statutes, they are likely to be made in many cases from considerations of political patronage. A discretionary authority to authorize exemptions or non-competitive examinations, either for specified classes of positions or for particular places, would introduce a useful flexibility in the system, such as is provided in the civil service laws of the United States and in most other states.

"(3) In regard to removals from the classified service, we

find that all of the laws, in some form or other, contain a prohibition of dismissals for political reasons, but the similarity ends here; and there is a difference of practice in restricting the removal power of appointing officers. The early laws did not contain any limitations except that an employee was not to be dismissed for political reasons, the theory being that if the method of appointment was carefully guarded there was no need to restrict the discretionary power of the appointing officer in discharging a subordinate. But recently the tendency has been in the opposite direction, and today the New York law is the only one without a positive restriction upon removals. In Wisconsin, New Jersey, Colorado and Ohio, the only limitations are that an employee in the classified service shall not be removed except for cause, that he shall be furnished with a written notice and given an opportunity to answer the same, and that a copy of the notice etc., must be filed with the civil service commission. In these four states the appointing power is given rather wide discretion to remove a subordinate, so long as he does not make the dismissal for political reasons and follows the general procedure outlined in the statute. In California, removals are not to be made except for cause and after a hearing, but the civil service board is given concurrent power with the appointing officer to discharge an employee, and the decision of either against the employee is made final. The California system does not limit the discretionary power of the appointing officer to dismiss an incompetent person any further than do the Wisconsin and New Jersey plans, but from the standpoint of discipline, it involves a division of responsibility. Turning to the laws of Massachusetts and Illinois one finds a still greater restriction upon removals. Under the Massachusetts act, no classified employee is to be removed except for cause and after a hearing, but the decision of the removing officer is not final and is subject to review by the courts. In Illinois, the discretionary power of the appointing officer is al-

most completely taken away and the sole responsibility for the discharge of an employee rests with the civil service commission, as a hearing is granted before the commission in all cases, and the decision of the board is made binding upon the superior officer. If it is necessary to provide for an appeal from the action of the appointing officer, the Illinois practice is much better than that of Massachusetts, for the question of removal is an administrative one, and can be more satisfactorily decided by a board than by the courts.

"It may be questioned, however, whether the requirement of a formal investigation to authorize any removal from the classified service is not unduly restrictive. This provision protects the officer or employee rather than the public service, and may be said to give a special and unnecessary privilege to those in the classified service. The provision is likely to encourage lax and inefficient service which falls short of the point where formal charges can be sustained. A provision requiring removals to be reported to the civil service commission and authorizing that body to investigate any cases which it deemed necessary, with a power to reinstate after investigation, where conditions warrant such action, should be sufficient to prevent removals without proper cause. All of the civil service laws in the United States are defective in failing to provide for a system of discipline over subordinates in the public service for minor shortcomings which are not sufficient to justify removal. With a proper system of discipline the efficiency of the public service could be much improved.

"Provisions in the several laws of more or less interest from an administrative standpoint are, briefly: those of the Illinois and Ohio laws for the appointment of the chief examiner upon competitive examination; the division of the state into civil service districts in Ohio, with an assistant in charge of each; the special authorization of the New Jersey Board to bring such suits as may be necessary to secure the

enforcement of the law and rules, and the duty of the commission in Ohio to report to the governor, or the mayor, as the case may be, any abuse of power by a public officer in making appointments and removals, with provision that such abuse shall be sufficient cause for the dismissal of the official.

"Civil service laws proceed upon the basic idea that for entry into the public service merit and fitness can be tested by examination; but to accomplish this end the preparation of examination questions and the grading of papers must be entrusted to expert examiners, who are specialists in their particular fields, and not to a few general examiners in the office of the commission. The Illinois Civil Service Commission, and the commissions in other states, have secured the coöperation of such specialists in examining applicants for a few of the more important positions, but there is need for a further extension of the use of expert examiners. Written examinations are not in all cases sufficient to test the practical knowledge of candidates and should be supplemented by oral tests, and by a paper upon some special topic which will test the ability of the applicant to apply his knowledge, and by weighing the experience of the several applicants. After a person has once entered the state employ it is possible to test efficiency in a more definite manner.

"One of the problems of a civil service commission is to induce competent persons to compete for positions in the classified service, and to provide prospective employees with information as to how they may enter such service. Most of the laws prescribe that the rules of the commission shall be published for distribution, the acts of New York and Illinois being most complete in this respect. The Illinois statute provides that notice of the places where copies of the rules may be obtained shall be given in all the newspapers of the seven largest cities, and that copies of the rules shall be sent to each county clerk to be kept for public reference. In New York, the commission is authorized to publish and sell, at a

nominal price, a pamphlet setting forth such information as may be of assistance in preparing a candidate for competition and illustrating the method of examination. A problem of similar character is to provide for the holding of examinations at such times and in such places as will be most convenient for the largest number of applicants. Most of the laws leave this matter to the civil service board, but in New York it is provided that examinations shall be held at least once a year in twenty-nine designated centers; and in Wisconsin they must be held simultaneously in each county. The Illinois and New Jersey laws further make it the duty of the commission to give notice of examinations in the newspapers of general circulation, and to provide for the posting of such notices by the county clerk in each county.

"The system of examinations increases the competition or available material for office from the mere handful of personal friends and acquaintances of the appointing authority to all those eligible to take such examinations. No attempt, however, has been made by the state governments to establish civil service schools, similar to the academies established by the National Government for military and naval training.

"Other special features in state civil service legislation which need further mention are: (1) the provisions of the New York and Ohio laws that the rules of the commission shall have the force of the law; (2) the provision in the Wisconsin act that examinations of a technical and special character be prepared by the incumbent of the office, by the head of the department, or by some one having experience and knowledge in similar employment; (3) the provision of the California law that the appointing officer may fill any position in the unclassified service according to civil service rules if he so desires; (4) the certification of only the highest name on the eligible list in Illinois and Colorado; (5) the prohibition in the California act of political assessments from persons on an eligible list, as well as from those already ap-

pointed; (6) the provisions of the Colorado and Ohio statutes forbidding classified employees to take active part in political organization and campaigns; and (7) the provisions of the Illinois, California and Ohio laws regarding the keeping of efficiency records and the standardization of the service.

"The keeping of efficiency records as required in Illinois, California and Ohio; the duty of the commission under the Illinois and Ohio laws to report to the officer in charge of any department its recommendations for increasing the efficiency of such department or for the removal of an employee who fails to maintain the proper standard; and the power of the California Board to make such removals, itself, are the most important of the above-mentioned features from the standpoint of increasing the efficiency of the work in the public service. These provisions, if made use of to their fullest extent, would not only enable the commission and the appointing officer to gauge the output of an employee and to discharge such as do not maintain the proper standard, but would also enable the civil service board to determine the relative effectiveness of its selective methods, to study the entire public service as a unit, and to give valuable advice to administrative authorities in regard to the organization and supervision of their employees.

"The above review of civil service legislation shows that the chief tendency has been toward the development of devices to prevent appointments contrary to law, to secure the general enforcement of the act, and to eliminate political influence, and that little attention has been paid to the working out of methods for securing high-grade experts. The chief need of civil service reform at the present time is the embodiment of such features as the keeping of efficiency records, which look toward greater efficiency in the public service. As a recent authority has expressed it, 'the watchdog type of civil service must give way to a constructive coöperation with

officials to secure high-grade experts who are at once both efficient and responsive.'

"In all of the states now having civil service commissions, the law provides that the members of the commission shall be appointed by the governor. Practically no restrictions are placed upon the governor's choice, through qualifications required of the commissioners, except that it is usually provided that not more than two of the three members of the commission shall belong to the same political party. This requirement seems to have been adopted in civil service laws, as in other cases, with a view to eliminating, so far as practicable, political considerations in the selection of the commission. In practice, however, such a provision has the opposite tendency, since it carries with it the implication that the members of the commission shall all bear a party label, although not more than two-thirds shall bear the same label. The result of this provision is to make the apparent intention of the law to be that the commission shall be party men, and with some exceptions, this condition is produced in practice. Bi-partisan combinations in favor of a lax administration of the law are rendered possible. At the same time, the bi-partisan character of the commission prevents the concentration of definite responsibility for such lax administration upon the party in power.

"Such provisions in regard to party appointments on civil service commissions are still upheld by those who recognize that in other fields they do not serve the purpose for which they were intended. The general tendency at the present time in public administration is towards placing definite responsibility in the hands of the chief executive for the higher appointments, and at the same time removing other positions from all political influence. The question may fairly be raised whether the appointment of civil service commissioners should not be placed definitely in one or the other of these classes, or whether such positions have peculiar characteris-

tics which justify an exceptional treatment. And it should be recognized that the present methods of appointing these officers does not definitely fix responsibility nor does it ensure the elimination of political influences, but rather tends towards a divided partisan control." [5]

One difficulty in the administration of the civil service laws has arisen from the frequent lack of understanding and coöperation between the civil service commission and the heads of departments in which members of the classified service are employed. An attempt has been made to overcome this difficulty in the method of constituting the examining boards for admission to the United States consular service and to secretaryships of embassy or legation. Such boards are composed of two elements, first, officials of the department in which the consuls or secretaries are to serve, and, secondly, a representative of the United States Civil Service Commission. The question may be raised whether a plan worked out on similar lines might not bring about greater coöperation in the administration of the state civil service.

It may also be questioned, however, whether the uniform practice of establishing boards at the head of the administration of state civil service laws is the best arrangement. The New Jersey Efficiency and Economy Commission has recommended that the law of that state be changed by replacing the four members of the state civil service commission with a department of civil service, composed of one head and three assistants. Such an innovation may be opposed, however, on the ground that a board is better qualified than a single-headed department to exercise quasi-judicial powers.[6]

"A proposed plan for the selection of civil service commissioners on a non-political basis is contained in the draft of a model civil service law prepared by a committee of the National Assembly of Civil Service Commissioners. This draft

[5] The above quotations are from Hanford, *op. cit.*, pp. 920-933.

[6] *Good Government*, xxxi, p. 4.

provides that civil service commissioners shall in the first place be appointed by the governor, but any vacancy in the commission shall be filled by competitive examination, held by a board of special examiners composed of (a) a person who has been for at least two years a member, secretary or chief examiner of a Federal, state, county or municipal civil service commission; (b) a person who has for at least two years been engaged in selecting trained employees for positions involving professional or technical skill; and (c) a person who has been for at least two years a judge of a court of record within the state. Under this plan the members of the commission should serve not for a fixed term, but during good behavior or until retirement at a given age. Trials for removal of a commissioner for cause should be conducted before a board constituted in a manner similar to that of the appointing board. This plan is urged on the ground that the civil service commission is not a part of the administration which is engaged in carrying out the special policies of such administration and should, therefore, be so far as possible free from political control. The commission, it is said, should not be subject to the control of those against whose interests it may sometimes be its duty to enforce the law; but should be an independent body of employment experts removed as far as possible from all political control.

"Two points of criticism may be made against the proposal itself. In the first place, it is based on the same confusion between political and party control which is evident in the existing laws. While it may well be urged that a civil service commission ought, if possible, to be a non-partisan body, it may be seriously questioned whether it should be removed from all political control, in the better sense of the word political. If the ultimate control of appointments to the public service were entirely removed from popular control, there would be good grounds for the charge often made against the present civil service laws, that this would lead to

a permanent bureaucracy, which could easily acquire control over the properly political organs of government. In the second place, the plan proposed definitely has in mind that civil service commissioners should be technically trained employment experts. This is a decided change from the ideas of the early leaders in the civil service reform movement. The purpose in most, if not all, civil service laws has been that the civil service commissioners should be public-spirited citizens with a large knowledge of affairs, who could formulate a proper system of rules and regulations for the selection of public officers and employees; but that the technical work of preparing suitable examinations and passing on the qualification of applicants should be carried on by technically qualified examiners, under the direction of the commission. The proposed plan points towards a commission whose members shall themselves be competent examiners. If these criticisms are sound, it should be frankly recognized that civil service commissions should be subject to political control; and that the selection should be made by the chief executive. It is not altogether clear whether that power and responsibility should be complete and unrestricted; or whether, in view of the patronage system which has prevailed in this country, it may be advisable to continue for a time the limitation on party appointments." [7]

Civil service regulations constitute a species of reform which has grown up with special reference to the particular conditions of American politics. It is a movement to abolish special privilege in securing positions in the public service, and hence is in the direction of democracy. It also aims to secure efficiency in administration by requiring special training for public service, and by creating a body of administrative officials free from the control of party politics. In attempting to free the administrative personnel from partisan control, however, the civil service reformers have sometimes

[7] Hanford, *op. cit.*, pp. 933-934.

gone too far in depriving department heads of proper and adequate administrative control over their subordinates, upon whom they are dependent for performing the work of the department. In the present state of partisan politics and administrative disintegration, strict civil service regulations for the larger part of the administrative personnel are doubtless desirable and necessary. But it should be recognized that, in so far as such regulations violate the principle of administrative responsibility of subordinate to superior officer, they should eventually be modified. Such a modification on any considerable scale, however, should await a reorganization of state administration along lines of greater concentration of authority and responsibility.

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PART III

THE FUNCTIONS OF THE ADMINISTRATION

CHAPTER X

TAXATION AND FINANCE

The functions of the state government may, from one point of view, be classified into direct and indirect. The former aim immediately at the accomplishment of the objects for which the government exists, while the latter are intended to supply the means or instrumentalities necessary for the performance of the direct functions. Among the former may be classed the promotion of the public health and education; among the latter, the selection of officers and the collection and disbursement of funds for public purposes. Generally speaking, everything that the state government does costs money and, consequently, the activities of the government in connection with the raising and expenditure of money are necessary prerequisites to the performance of all other functions. The importance of the financial operations of the state corresponds roughly to the aggregate scope and extent of its functions and activities. The increasing paternalism of the state, the ever-widening scope of state interference, the need for better highways, better educational facilities and other modern improvements require an ever-increasing outlay on the part of the state, which must, sooner or later, be met out of the proceeds of taxes. Ever more acute and pressing, therefore, becomes the problem of securing a productive and equitable system of taxation and of adopting economical and efficient methods in the collection and disbursement of public funds.

The financial operations of the state government may, for purposes of convenience, be considered under three main

heads: first, income; secondly, expenditure; and, thirdly, the correlation of income and expenditure. The income of the state is derived not only from taxes, but also from fines and from fees and charges imposed upon particular individuals for special services or reasons. Some states also enjoy an income from the sale of public lands granted by the United States Government for the use of public schools and other purposes. Minnesota and Texas, for example, derive a considerable revenue from this source. Minor sources of state revenue include interest, rent, grants, gifts, forfeitures and escheats, and earnings of business enterprises. From the standpoint of bookkeeping, states also derive an income from floating loans and selling bonds.

The issuance of bonds is a device whereby a state is enabled to spread over a series of years payments, the total amount of which would otherwise have to be met out of current taxes. From the standpoint of financial policy, resort to this device is justifiable in the case of large expenditures for permanent improvements and extraordinary or unusual objects, but the date of the maturity of the bonds should, of course, not be placed beyond the life of the benefit to be secured from the contemplated expenditure. The exercise of the borrowing power by the state governments may be essential to the carrying out of an important public work, such as the opening up of waterways for navigation and the adoption of a far-sighted policy of conservation of natural resources. In the hands of the state governments, however, the lack of adequate safeguards against the unrestricted exercise of this power may lead to the piling up of huge and largely unnecessary debts for posterity to pay. The experience of the states during the internal improvement period before the Civil War led to the adoption of various constitutional restrictions designed to discourage excessive exercise of the debt-incurring power of the legislature, such as the requirement of an annual tax sufficient to pay the interest and

discharge the principal of the debt upon its maturity,[1] or that no debt in excess of a certain minimum shall be incurred, unless for specified purposes or unless authorized by popular vote.[2] In practice, however, the legal limitation of a popular referendum has not operated as a very decided check upon unwise and unnecessary borrowing. Nevertheless, some states now have scarcely any indebtedness, either bonded or floating; while, in all the states, the total outstanding indebtedness, as compared with the total assessed valuation of property within the state, is small.[3]

By far the larger part of the revenues of the state governments is derived from taxes, and with this phase of the subject, therefore, we are more particularly concerned. In few matters have the American people displayed greater conservatism than in connection with state and local taxation. The roots of the tax systems of the older states along the Atlantic coast go back into the colonial era, and the newer states have copied the characteristic features of the old. Both with respect to the sources of income and the administrative methods of assessment and collection, taxation in the colonial period was meager and rudimentary. In some instances the general property tax early became the backbone of the system. More frequently, however, direct taxes were levied upon certain specified articles of property, to which were added a poll tax and, perhaps, a license or business tax, and excise taxes. Custom duties were also collected by the colonies until the establishment of the Federal Government. In practically all

[1] The proposed New York Constitution of 1915 provided that this sinking fund plan should be displaced by the simpler and more businesslike serial bond plan, under which the bonds would be paid in equal annual installments.

[2] Cf. H. Secrist, "An Economic Analysis of the Constitutional Restrictions upon Public Indebtedness in the United States," *Bulletin of the University of Wisconsin, Economics and Political Science Series,* Vol. viii, No. 1, Part 1; H. C. Adams, *Public Debts,* Part III, Ch. IV.

[3] In 1913 the total outstanding debt of all the states was $423,000,000, more than half of which was owed by Massachusetts and New York.

cases, the property levied upon was visible and tangible. By 1796, Wolcott reports that four states, including New York, have the general property tax, while the others tax certain specific objects.[4]

Since the financial needs of the colonial governments were small, the machinery of levying and collecting taxes for colonial purposes was naturally crude. The principal objects of public expenditure at that time, such as the building of highways, bridges, jails, and poorhouses, were considered to be not of general colonial interest, but of merely local concern. Since local machinery for levying and collecting taxes for these purposes already existed, the colonial legislature frequently utilized such machinery for the collection of the colonial or provincial tax also. Such local machinery was utilized either directly or indirectly through the medium of the local unit of government. The latter method consisted in the apportionment by legislative enactment of definite lump sums among the various towns. This method was followed in New Jersey as early as 1668 and in Massachusetts after 1692.[5] The difficulties and defects of this method were that it placed no direct pressure upon individual taxpayers, that it provided no equitable basis for the apportionment, and that no adequate means were provided for compelling the towns to comply with the requirements of the law.

More frequently, the local machinery was directly utilized by the central government through provisions requiring local officials to collect the tax levied for colonial purposes and to pay the proceeds either directly or indirectly into the colonial treasury. In the New England colonies, the officers designated to perform this function were usually those town offi-

[4] Wolcott's "Report on State Finances," in *American State Papers,* vii, p. 437.

[5] John Whitehead, *Judicial and Civil History of New Jersey,* i, pp. 119, 124; Leaming and Spicer, *Grants and Concessions,* p. 81; R. H. Whitten, Public Administration in Massachusetts, *Columbia University Studies,* viii, No. 4, Ch. 7.

cers having special financial duties, such as town assessors and treasurers, while, in the Middle and Southern colonies, the legislature generally made use of officers having normally duties of an essentially different character, such as constables, marshals, sheriffs, and justices of the peace. In either case, such officials were usually either elected by the voters of the localities, or appointed by the governor, and the reliance of the legislature was thus placed upon officers who were, in the main, not responsible to itself. The control which the legislature exercised over them was so feeble that the colonies sometimes found themselves in financial difficulties through the neglect of such local officers in performing the duties laid upon them by law.[6]

Such difficulties pointed to the need for adopting measures to curtail, to some extent at least, the complete autonomy of the local units of government in financial affairs. Such measures, as actually adopted, consisted either in the establishment of central supervision over the local machinery of assessment and collection, or in the direct creation by the General Assembly of instrumentalities to be used for this purpose. Thus, the New York tax act of 1683, while utilizing the local machinery, also provided for centrally-appointed commissioners in each county, who were to direct and supervise the local officers.[7] Five years later, county commissioners with similar functions were appointed by the Assembly in East Jersey.[8] Thus, in these colonies, a group of centrally-appointed officers was superimposed upon the local machinery of tax administration. In some places, this tendency towards centralization was, at this early period, carried so far as almost entirely to dispense with the local machinery in assess-

[6] Cf. preambles to New Jersey Acts of 1677 and 1701, Leaming and Spicer, *op. cit.*, pp. 125, 581.

[7] Colonial Laws of New York, 1683, Chap. 14, cited by Fairlie, Centralization of Administration in New York State, *Columbia University Studies*, ix, p. 562.

[8] New Jersey Laws, Act of 1688, Leaming and Spicer, *op. cit.*, p. 306.

ing and collecting the provincial tax. Thus, by act of 1701, the Assembly in West Jersey named and appointed the assessors and collectors of taxes in each township in the province.[9] In case any of the assessors or collectors failed to perform their duties under the act within the allotted time, the governor and council were empowered to remove them and appoint others in their places. This drastic measure, it will be seen, combined both legislative and administrative centralization to a considerable degree. Nevertheless, even here the machinery of local government was not entirely dispensed with, for the assistance of the town constable was to be utilized in proceeding against delinquent taxpayers.[10]

This early period of centralization was followed by a reaction towards localism. The locally elected town and county officers having fiscal functions administered the local poor rate and other local taxes, and, so long as the amount of the provincial tax was small, it was deemed that no great harm would come through the utilization of such local officers in collecting the provincial tax. Hence, in New York, the administration of the provincial levy of 1728 was directed by the elected town supervisors.[11] In New Jersey, the assessment and collection of the provincial tax were in 1716 intrusted to local officers elected annually by the voters of each town; and in 1730, central control over the administration of provincial taxes was still further weakened through the provision that county collectors were no longer to be appointed by the assembly, but were to be elected by the voters of each county.[12] Thus, by 1730, the administration of the

[9] New Jersey Laws of 1701, Leaming and Spicer, *op. cit.*, p. 581.

[10] At this early period, the collection of taxes was sometimes farmed out to the highest bidder, as in the case of the excise taxes of New York of 1653 and of New Jersey in 1716. Fairlie, *op. cit.*, p. 558.

[11] Colonial Laws of New York, 1728, Ch. 530, cited by Fairlie, *op. cit.*, p. 564.

[12] Acts of New Jersey General Assembly, 1716, Nevill's edition; New Jersey Laws of 1730, Bradford's print.

provincial direct tax in New York and New Jersey had become almost entirely decentralized.

The development of tax administration in the various colonies differed in details, and here and there attempts were made to establish certain restraints upon the free action of local officers, or to compel them to perform their duties more efficiently. Nevertheless, it may be said that, by the time the colonies were transformed into states, the tendency towards almost complete administrative decentralization had become very widespread. After the beginning of the nineteenth century, the direct property tax, whether specific or general, was primarily a local tax, assessed and collected by local officials, with little or no state supervision. The state tax was levied upon the same sources as the local tax and the state rate was thus added to the local rate and collected by one and the same operation. This decentralized system, thus early developed, has, with some modifications, remained the central feature of state tax administration even down to the present day.

As already noted, a few states, including New York, levied, almost from the beginning, a general property tax, but, in most of the states, specific objects were singled out and assessed for taxes. At the beginning of the nineteenth century, property was not yet highly differentiated, and consisted principally of land and improvements, and tangible personalty, such as live stock, slaves, and household furniture. Under these conditions, taxes could be levied upon these specific classes of objects with a reasonable assurance of covering the greater portion of the taxable ability of the people. Even at this early period, however, the mass of property was becoming more highly differentiated. The gradual development of new forms of wealth raised a popular demand that they should not escape their share of the public burden through failure of the law to designate them as objects of taxation. Hence, in states having specific property taxes,

the legislatures were continually under the necessity of enlarging the list of taxable objects, thus gradually approaching, if not quite reaching, a general property tax. Finally, however, in order to avoid the necessity of enacting a long and cumbrous list of taxable articles and the danger of omitting some that ought to be taxed, the specific property tax was transformed into the general property tax. This transformation, which was, in some states, more of a change in the form of the law than in its practical effects, occurred generally about the middle of the nineteenth century. Thus, the change took place in Illinois in 1839, in Ohio in 1846, and, in 1851, New Jersey took the same step.[13] In many states this change was subsequently embodied in the constitutions. Probably the most explicit statement of the principle of the general property tax is found in the Ohio Constitution of 1851, which provides that "laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money."[14] In spite of all efforts at amendment, this provision still remains in the constitution of that state, and about half of the states of the Union have similar constitutional restrictions requiring the continuance of the general property tax. Furthermore, about three-fourths of all state and local revenues are derived from this tax, so that it may be justly described as the distinctive and characteristic American form of taxation.

The purpose of the general property tax was to spread the public burden as evenly as possible over all persons in the community in accordance with their respective abilities to contribute, as measured by the value of the property which

[13] Ohio Laws, xliv, p. 85; New Jersey Laws, Act of March 14, 1851; Illinois Constitution of 1818, Art. VIII, Sect. 20.

[14] Provision was made for the exemption of certain kinds of property, but this was not considered as a departure from the principle of the general property tax.

they possessed. This purpose, however, could be fully achieved only in isolated, rural communities, in which only primitive forms of property existed. These conditions were to some extent met in many of the states during the first half of the nineteenth century. The principal forms of property were land and chattels, which could not easily be concealed from the assessor; transportation and transmission lines owned by private corporations had not yet developed to any considerable extent; and the financial needs of the states were comparatively small. Under these conditions, the uniform *ad valorem* system worked tolerably well. But the great difficulty in connection with the general property tax is that, either through its crystallization in constitutions, or through inertia on the part of legislatures, or general popular ignorance of economic principles, it has been retained long after it had become antiquated and unsuited to modern complex conditions. Although this tax was never an ideal tax, it nevertheless worked fairly well during the agricultural stage of our industrial development. But since we have reached the commercial stage in which corporate and intangible personal property are among the most valuable and extensive forms of wealth, the general property tax breaks down both in theory and in practice. It breaks down in theory because not property but net income is probably the better test of tax-paying ability. Moreover, taxes on some forms of property are shifted, while on others they are amortized. In its practical working and actual administration, the general property tax is even more obnoxious than its theoretical defects would indicate.

As already noted, the general property tax was in origin primarily a local tax and was locally administered. The actual administration still continues to remain in large measure in the hands of local authorities. The process of administering the general property tax consists in the assessment or valuation of property which is taxable within the given juris-

diction, the calculation of the tax rate upon the basis of the total valuation as compared with the amount of proceeds desired from this source, the computation of the proportionate share of the total taxes to be paid by each taxpayer, the levying of this amount against him, and the collection of the tax. The determination of the state tax rate is made either by legislative enactment or by a state board or official. The assessment of the property and the collection of the tax are in the hands of local officials. When collected, the respective shares of the proceeds due the county and state are transmitted to the county and state treasurers by such local officials. The expense of the collection in some localities eats up a considerable percentage of the proceeds. More efficient and economical administration in the collection of taxes might be secured by consolidating the local units of collection into the county and having all local and state general property taxes collected by the county treasurer or his deputies.

The initial step, as well as the most important and fundamental in the administration of the general *ad valorem* system, is the assessment or valuation of the various articles or pieces of property. For the purpose of making this assessment, the local subdivisions of the state, such as counties, cities and towns, are adopted as taxing districts. In so far as the state depends on the property tax for its revenue, it is directly concerned in the accuracy and efficiency with which the original assessment is made. Nevertheless, in accordance with ideas of local home rule, which have their roots far in the past, the assessment is generally made by appointed, or, more usually, elected officers of the local unit of government. No qualifications, calculated to secure competence in the office of local assessor, are required, and any voter is eligible for election to this important position. The taxing districts are usually too small to require the full time of the assessor for more than a small part of the year, and the salary or per diem is small. The term, moreover, is usually short, and, in

some places, as in Kentucky, the assessor is made ineligible to succeed himself. Hence, the office holds out no great inducements to capable men; it offers no career or rewards for faithful performance of duty, and in many localities is regarded as a temporary sinecure for persons having local political influence. Where the assessor is ineligible to succeed himself, he does not remain in office long enough to become expert in the performance of his duties. On the other hand, where he is legally reëligible, the more expert he becomes and the more efficiently he discovers and assesses the property in his district, the more obnoxious he is apt to make himself to influential local residents, and the less apt is he to be reëlected. Under these circumstances he sometimes becomes the puppet of political and personal influences, and his continuance in office depends upon his easygoing indifference to the rigid and equal enforcement of the law. In short, the method of local election by the voters whose property it is his business to assess tends to secure incompetent assessors, and if, by chance, an efficient man should be elected, his very efficiency is apt to cause his involuntary retirement from the office at the earliest opportunity.

The actual valuation of different kinds of property is a function requiring, for its proper performance, a considerable degree of technical knowledge. Yet the local assessor is called upon to perform it without adequate means at his disposal, other than his own judgment and the assessment roll of his predecessor. Frequently, the previous valuations are followed with little change, and thus inequalities are perpetuated. In colonial times, it was customary to provide by law that different classes of property should be assessed at certain arbitrary valuations, without taking note of differences in the actual value of different articles in the same class. At present, however, most of the states having the general property tax require by law that all property, both real and personal, shall be assessed at its full and true value in money,

which is usually construed to mean the price which it would bring at a voluntary sale in open market. But the hiatus between the law and its administration is great. The assessors of a given county sometimes agree to evade the law by assessing all taxable objects of a given kind, such as pianos, sewing machines, or acres of land, at a certain fixed and arbitrary figure. Since the percentage of this figure to true value will be the same in scarcely any two cases, the whole process is honeycombed with inequalities. In actual practice, the ideal of full valuation is seldom realized. Realty approaches it more nearly than other forms of property, but personal property is notoriously undervalued, or escapes entirely. Frequently, personal property taxes are assessed upon hardly anyone in the community except those whose names are already on the assessment rolls as liable to taxes on real estate. It is physically impossible for the assessor to assess all personal property from actual view, and it is customary in many places to require the taxpayer himself to make a sworn statement of his taxable property, the different items being listed under various subheads. In some states he may be required not only to list all his property under oath, but also to swear to the value of each item. This method practically amounts to self-assessment, for, though the assessor may revise the statement, he usually makes little effort to verify its sufficiency. It is obvious that such a plan is doomed to failure. "If Jove laughs at lovers' vows, he probably guffaws at taxpayers' oaths. Even the Psalmist's hasty allegation of universal mendacity needs little qualification in this province of finance. Where the taxpayer's conscience is tender, he finds that virtue is perforce its own reward." [15] Instead of being equal in proportion to ability, the tax becomes progressive in proportion to honesty. It thus places a premium on dishonesty, and has been justly described as a "school of perjury."

The general property tax is thus seen to be, in actual oper-

[15] W. M. Daniels, *Elements of Public Finance,* p. 123.

ation, unequal not only as between different individuals, but also as between different classes of property. Under this tax personal property everywhere fails to bear its proportionate share of the burden. This is true even with respect to tangible personalty. Thus, according to the assessment figures, the full cash value of all the diamonds and jewelry in Chicago in 1911 was only about a half-million dollars. In the same city, there was not a single melodeon or organ, and only one person in every 188 inhabitants owned a watch or clock.[16] In the case of intangible personal property, such as stocks, bonds, mortgages and other securities or certificates of indebtedness, whose existence may be so easily concealed from the assessor, the number which escaped or the extent of undervaluation was, of course, much greater than in the case of tangible personalty. The figures of the United States Census Bureau show that, in 1912, the assessed valuation of real property and improvements subject to *ad valorem* taxation was, for the entire country, about fifty-two billions of dollars, while that of personal property was only about seventeen billions, though the true value of personal property was doubtless considerably greater than that of real estate.

Undervaluation, whether of real or personal property, is due in part to the ignorance of the average assessor as to the true value of certain kinds of property. The small dwelling and scanty household furniture of the laboring man he is able to assess with tolerable accuracy, but the true values of the palatial residence of the millionaire and of large hotels and office-buildings together with their contents are beyond his ken, and his estimates in the latter cases are apt to be very much below the full value. Thus, the rich frequently escape with comparatively light taxes, while the poor man is heavily burdened. In the case of corporate property, such as the plant of a manufacturing concern, the assessor's esti-

[16] R. M. Haig, History of the General Property Tax in Illinois, *University of Illinois Studies in the Social Sciences,* iii, pp. 160-161.

mate is apt to be still further from the true figure. Even experts may disagree as to the value of such properties, hence the assessor's failure is not altogether his own fault, but is due to the fact that he has been set to perform a task which, with the means at his command, is practically impossible. This is particularly true in the case of the properties of transportation and transmission companies, a small part of whose lines may run through the assessor's taxing district. Any efforts he may make to assess such property at its true value are bound to fail, for he acts absolutely without guide or compass.

Undervaluation, however, cannot be wholly attributed to ignorance on the part of the local assessor, but to some extent is undoubtedly due to conscious design. In some cases the assessor feels that some kinds of property and the property of some individuals are escaping their just share of the tax burden and therefore consciously undervalues the property of other individuals and other kinds of property in order to effect a rough sort of equalization. He doubtless remembers also that the taxpayer is less apt to protest against his assessment if it is obviously under true value, even though the property of other taxpayers is undervalued to an even greater extent. "Almost every general tax has had to be administered with the drug of indirection or undervaluation. To make the taxpayer swallow the dose, we have adopted the policy of soothing and befuddling him with a little pretended graft or a pseudo rake-off." [17] Some states, such as Iowa, Illinois, and Nebraska, have adopted what has been called the "ostrichlike policy" of legalizing fractional assessment. It might be supposed that little importance is to be attached to undervaluation in itself, since its effects may be counteracted by the simple device of shifting the tax rate. But the evil of undervaluation is that it tends to intensify, at the same

[17] Thomas S. Adams, in *Proceedings of the Washington State Tax Conference,* 1914, p. 207.

time that it disguises, the extent of the inequalities between individuals within the same taxing district.

The administration of the general property tax by local assessors produces inequalities not only between individuals within the same taxing district, but also between different taxing districts. Inasmuch as the state tax is laid upon each county and the county tax upon each minor taxing district in proportion to the total assessed valuation of property within such county or district, a positive incentive is held out to the local assessor to keep the valuation as low as possible, in order that his district may bear as small a share as possible of the state and county taxes. Each local assessor vies with the others in the race towards undervaluation. The result is that in all of the taxing districts, property is undervalued, but the extent of the undervaluation is not apt to be exactly the same in any two districts. In some it may be thirty per-centum of true value, in others fifty and in still others seventy. The assessor who hews the closest to the law requiring true value in assessments finds that he has not only made himself unpopular with the people of his district upon whom he must depend for reëlection, but that his efforts have resulted in saddling his district with a larger share of the state and county taxes than other and, perhaps, wealthier districts in which the undervaluation is greater. In this case, therefore, undervaluation produces positive injustice as between groups of taxpayers in different taxing districts. It must not be supposed, however, that the incentive to undervaluation which results from taking the local assessments as the basis of state and county taxes is the sole cause of inequalities between different taxing districts. Quite aside from this consideration, inequalities of this kind would almost inevitably arise where each local assessor proceeds entirely on his own responsibility, without effective coöperation with other assessors and without adequate central guidance or control.

The operation of the general property tax, therefore, re-

sults in inequalities between the owners of the same kind of property, between the owners of real and personal property, and between different taxing districts.[18] It was originally adopted as a state tax as a matter of convenience because it already existed as a local tax, and, in an age when property was tangible and localized, it was deemed to be, at least theoretically, proportionate to taxpaying ability and in accordance with the democratic principle of equality of sacrifice. When attention is directed, however, to its actual administration under present-day conditions, it is found to be inequitable because it does not rest on individuals or corporations in proportion to taxpaying ability, but rather in inverse proportion to such ability. If, as its name implies, it were in reality a general property tax, it would still not be an ideal tax, but many of the objections now made to it would be invalidated. Inasmuch, however, as certain kinds of property, such as intangible personalty, very largely escape, it fails to be in reality a general property tax. By some, this situation may be contemplated with equanimity as tending toward the single tax. But, whatever views one may hold upon the subject of the single tax, it must be admitted that the hiatus between the general property tax law and its administration is, in itself, an evil which calls for remedy. Furthermore, it may be questioned whether the general property tax is the best available tax for state purposes, both from the standpoint of a just distribution of tax burdens and from that of yield or revenue to the state.

The fact that the states still rely so largely upon the general property tax or, at least, retain it upon their statute-books, is due in part to a tendency on the part of many people to regard the theory of the law rather than its actual administration, in part to constitutional restrictions which prevent a modification of the law, and in part to the feeling of certain persons or classes of persons in the community that

[18] Cf. H. C. Adams, *Science of Finance*, pp. 434-449.

any change would be likely to work adversely to their interests. In spite, however, of popular and legislative inertia, of constitutional restrictions, and of the opposition of interested persons, many inroads have been made in various states upon the general *ad valorem* system based on local assessments. The history of state tax administration during the last few decades may be said to consist in large measure of the efforts of various states to strengthen, to modify, or to provide substitutes for the general property tax. Among the principal methods or devices which have been adopted or considered in order to effect these objects may be mentioned equalization and review, strengthening of local administration, direct state assessment or apportionment on a basis other than local assessment, separation, classification, exemption, the adoption of special state taxes, and the centralization of administration through the creation of permanent state tax commissions.

The oldest and most widespread method adopted for the purpose of remedying the inequalities of the general property tax is through what is known as equalization or review after the original assessment has been made. Strictly speaking, the term "equalization" refers to the equitable adjustment of valuations as between local taxing districts within a county or as between counties within a state, but it is also frequently used as applying to such adjustment of individual assessments. The latter function, however, is more properly termed review. An individual whose property is assessed at a disproportionately high figure as compared with similar property in the same taxing district may ordinarily appeal to the courts for relief. In most cases, however, he could secure no relief from this source unless he could prove that his property was assessed at more than the true and full value required by law. If his property were assessed at eighty per cent of full value while the average assessments in the taxing district were only forty or fifty per cent of true

value, the court would usually be powerless to grant relief. Even under the supposition, however, that the court is empowered to redress grievances from the standpoint of the actual administration of the law rather than from that of its terms, judicial procedure is too slow, cumbrous, technical and expensive to afford a practicable means of relief except in very unusual cases. Moreover, court action affects only the particular individual who seeks such action, and is consequently not effective as a means for broad, general relief from widespread inequalities. Judicial action as a practicable means of relief from the inequalities of the general property tax is almost necessarily inferior to administrative action.[19]

During colonial times, the quota of the provincial tax to be raised by each taxing district was sometimes determined through assignment of definite sums by the colonial legislature. This taxing district was sometimes the town, but more usually the county. The amounts levied probably were originally mere rough estimates of the ability of the respective districts to contribute to the support of the central government. This method was adopted in Massachusetts in 1692 and the apportionment among the towns was made by the General Court until 1871, after which this function was assigned to the State Tax Commissioner.[20] Since, under this plan, the state tax is an apportioned rather than a percentage

[19] Judicial action may interfere with the efficiency of administrative action through injunction proceedings aimed at restraining local tax collectors from enforcing collection of taxes from large taxpayers and corporations. In order that the state may protect itself from such a condition as this, Governor Hay of Washington recommended in 1911 the "enactment of a law directing that no suit shall be brought in any court enjoining the collection of taxes, but that any person, firm, or corporation feeling unjustly taxed, may pay under protest, after which action may be brought to recover, with interest at the legal rate from the time payment was made, for what sum, if any, was improperly exacted." *Washington Senate Journal,* 1911, p. 49.

[20] R. H. Whitten, Public Administration in Massachusetts, *Columbia University Studies,* viii, No. 4, Chap. 7.

tax, it does not hold out any definite incentive to under-assessment. Hence, there is no definite need for any special machinery of equalization, for such equalization as exists takes place in the act of apportionment itself.

In other colonies, legislative apportionment of stated quotas upon taxing districts, which at first were mere rough estimates of tax-paying ability, later came to be based more definitely on local valuations of property, and finally developed into a percentage tax. Thus, in New Jersey, by an act of 1751, lists of ratables were required to be made by the local assessors for the special purpose of enabling the legislature to determine the quotas of the several counties in levying a provincial tax. It appears that this method of securing information did not prove reliable, in the opinion of the legislature, for, according to the preamble to an act of 1768, it "appeared upon inspection of the assessment lists laid before the General Assembly that there were great deficiencies; and the form and directions prescribed by law have not been observed by many of the assessors, nor a true and exact return made of the quantity of land in their several townships." Moreover, the quotas settled by the legislature, even if equitable at first, soon became disproportionate through fluctuations of values. Consequently, towards the end of the colonial period, the method of legislative apportionment by quotas was, for the time being, abandoned, and a definite rate was laid on the pound value of estates, and a fixed or limited sum on sundry articles called "certainties." [21] The state tax thus became, at least in part, a percentage tax. But the number and value of estates and the number of "certainties" in each taxing district was dependent on the finding and valuation of the local assessors in such district. Thus, each district assessed itself and thereby automatically determined the share of the state tax which it would have to bear. As long as the state tax was a relatively small part of the total

[21] New Jersey Laws; Act of March 26, 1778.

tax burden, the inequalities which resulted from this method of self-assessment by districts were of comparatively little importance. But when the state tax became heavier, the incentive to underassessment became greater, and inequalities between taxing districts became more glaring. Hence the situation seemed to require the creation of some machinery of equalization for the correction of such inequalities.

For this purpose, state and local boards of review or equalization have now been provided in most of the states. In a few states there is, immediately above the local assessor, a township board of review with power to increase or decrease individual assessments. Above this board, there is usually a county board of review, whose function it is to equalize the aggregate assessments of the taxing districts in the county, and it may also, as a rule, change individual assessments. The correction of errors, however, in the assessments of the comparatively few individuals who go to the trouble and expense of appealing to the county board barely touches the surface of the inequalities in the assessments as a whole. The local boards of review are usually *ex officio* bodies, who are either constituted judges of their own work of assessment or else are too unfamiliar with the conditions with which they are called upon to deal. Hence, the work of such boards is largely ineffective; political influences not infrequently enter into their determinations, and sometimes their conduct of official business degenerates into a contest between groups of members representing urban and rural taxing districts, respectively, in which entire valuations of districts are arbitrarily increased or diminished.[22]

Finally, in all except a few Southern states, provision is made for some plan or method of state equalization. In a number of states, the function of state equalization has now been conferred upon permanent state tax commissions, which

[22] Cf. Report of New Jersey Special Tax Commission of 1890, *New Jersey Legislative Documents, 1891*, i, pp. 12 ff.

have other important functions in addition. Formerly, however, the state board of equalization was generally composed of certain elective state officers acting *ex officio,* who naturally devoted only a comparatively small portion of their time and attention to the work of the board. The New York State Board of Equalization, created in 1859, was somewhat of an improvement over the purely *ex officio* type of board, inasmuch as three of its nine members were appointed by the governor. The most cumbrous and ineffective type of state board of equalization is represented by that found in Illinois and, formerly, in Ohio. The Illinois board is composed of the state auditor and one member elected from each of the twenty-five congressional districts in the state. The Ohio board, which was abolished in 1910, consisted of the state auditor and one member elected from each of the forty senatorial districts. The Illinois board meets for a few weeks each year, while the Ohio board met only once in ten years. The defects in the organization of these boards are obvious. They are too large for effective work, and the method of election by districts has had the natural tendency to make each member feel that he represents his district for the purpose of keeping its aggregate valuation as low as possible. The powers of state boards of equalization sometimes include the changing of the assessments of individuals and corporations and the direct assessment of special kinds of property. More usually, however, the work of the older type of board was confined, as in the case of the New York board of 1859, to effecting a horizontal increase or decrease of the aggregate valuation for entire counties.

The character and methods of state boards of equalization vary to such an extent that it is difficult to lay down any general rule as to their effectiveness. Under especially favorable conditions they may bring about a considerable increase in valuations. Thus, in the six years ending in 1910, the assessed valuation of property in New Jersey increased

from $1,055,000,000 to $2,045,000,000. After making due allowance for the natural expansion of values, it still remains true that much of this increase was due to the work of the State Board of Equalization. This board, however, was a small appointive board, having some powers of supervision over local assessments and able to secure the effective coöperation of the county boards of equalization. Compare with this the situation in Illinois where, in 1908, the aggregate assessed valuation of all property, as equalized by the state board, was $1,263,000,000, or only about two hundred million dollars more than it had been in 1902.[23]

On the whole, it may be said, with respect to the elective and *ex officio* boards, that their action tends to be more or less perfunctory. They make comparatively little change from the local assessments as equalized by the county boards, and such changes as they make are more apt to be deductions than increases, and to be arbitrary in character rather than upon the basis of any reliable data. Having neither the means nor, as a rule, the inclination, to make an intensive study of local conditions, these boards can have no accurate information apart from the figures furnished by the local assessors and boards, upon which to base a scientific equalization. Moreover, under conditions of widespread inequality in local assessments, equalization by the state board cannot effect a general improvement without amounting practically to a general reassessment. Inasmuch, however, as a general reassessment would be beyond the scope of action of the old-fashioned state board of equalization, the original assessments, if unequal at first, are very apt to remain so, as far as any corrective influence on the part of the state board is concerned. The attempt of the board to equalize after the assess-

[23] In 1909 there was a very considerable increase in valuations over the figures for 1908, but this was not due to the work of the State Board of Equalization, but, in large part, to the legal change from the one-fifth to the one-third basis.

ment has been not inaptly described as shutting the barn door after the horse has escaped. These boards, says Seligman, "are at best mere makeshifts—clumsy attempts to accomplish the impossible."[24] They represent ineffective attempts to cure inequalities, whereas the need is for some means of preventing such inequalities from arising in the first place. If the original assessments are reasonably fair and accurate, there will then be little need for any subsequent equalization.

Discarding equalization as an ineffective remedy for the evils of the general property tax, we are forced to look elsewhere for a solution of the problem of securing an equitable and productive system of state taxation based on local assessments. Some degree of expertness in the making of the original assessments is almost the *sine qua non* of an efficient *ad valorem* system, yet this can scarcely be attained under prevalent methods of local assessment work and the system of local control of the assessment officers. With the design of strengthening the local tax administration, some measures may be adopted which fall short of central administrative supervision. Some of these, such as making more severe the penalties provided for evading the tax or strengthening the oaths required of assessors and taxpayers, have in practice proved ineffective. Some assistance to local assessors in arriving at correct valuations may perhaps be given by the passage of laws requiring that the true consideration in the conveyance of property shall be stated in the deed. Pressure may perhaps be indirectly brought to bear to counteract to some extent the general tendency towards undervaluation through the enactment of laws limiting the tax rate.[25]

Of a somewhat more promising character are laws found in some states requiring publication of assessment lists. Such laws have been passed in Illinois, Ohio, and a few other

[24] *Essays in Taxation*, 8th ed., p. 22.

[25] Such, for example, as the Ohio law of 1910. Ohio Session Laws, 1910, p. 430.

states. The publication is made in pamphlet form or in the newspapers at the expense of the county. The object of publication is to enable the taxpayers in each community to compare the assessments of different pieces of property, to enlist their efforts in discovering and correcting inequalities, and thus to arrive at something approaching a community valuation. As a general principle, publicity in assessments is undoubtedly a wholesome influence. Unfortunately, however, the laws are defective in some respects and do not go far enough in others. They may enable the taxpayer to check up the results of the assessors' work, but publication is sometimes delayed until it is too late to correct inequalities except through the action of the board of equalization. Moreover, the publication merely gives the results of the assessors' work and fails to give what might prove to be the more valuable information regarding the methods by which they arrived at their conclusions.

The publication of assessment lists is an appeal to private initiative to strengthen the assessors' work by aiding in eliminating inequalities. A still more direct appeal to private initiative with this purpose in view is found in the so-called tax inquisitor law, formerly found in Ohio,[26] Iowa,[27] and a few other states. This law authorized the county board to employ private persons to ferret out such taxable property as may have escaped the assessor, and to pay such persons a commission based on the amount of additional taxes secured through their efforts. That these laws are unsatisfactory in practice is implied in the repeal of her law on this subject by Ohio, which has shown more confidence than most other states in the feasibility of so strengthening the administration of the general property tax as to make it a workable and equitable tax.[28]

It ought not, however, to be necessary to pay private

[26] 77 Ohio Laws, 204. [27] Laws of 1900, Ch. 50.

[28] Cf. T. N. Carver, "The Ohio Tax Inquisitor Law," *American Economic Association, Economic Studies,* iii, No. 3, June, 1898.

persons to do that which public officials are already being paid to do. Such officials should be given the means and opportunity to perform their duties so efficiently that there would be no need for any dependence on the efforts of tax ferrets or other informers. Assessors should be given longer terms or even indefinite tenure, more continuous employment, more adequate compensation, and should be supplied with tax maps and other necessary tools. In order to effect some of these improvements, a change in the size of the local taxing district would be necessary in many states. In rural districts, the taxing unit should be not less than the county, as it is already in a number of states. The establishment of the county-assessor system and the abolition of the numerous local assessors has been strongly recommended by a number of state tax commissions.[29] But in states where the township is the local unit of government for general purposes, it is apt to be utilized as the tax unit also. Where the local unit, less than a county, is retained, there should be a county supervisor of assessments as a connecting link between the local and the state authorities, such as exist in Indiana, Wisconsin and other states. The consolidation of all the taxing districts within a county into the county unit would bring about conditions conducive to the granting to assessors of more adequate compensation and the opportunity for more continuous employment. Assessors should be appointive rather than elective, and the appointments should be made by the county board subject to state central supervision, or by the state tax board in accordance with civil service regulations, as in the case of the Wisconsin assessors under the income tax law of that state, enacted in 1911.

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[29] *Report of Minnesota Tax Commission,* 1912, p. 123; *Report of North Dakota Tax Commission,* 1912, p. 158; *Report of Kansas Tax Commission,* 1913, pp. 35-37, 85. The North Dakota Commission calls attention to the fact that uniformity is impossible in that state, where there are over 1,400 local assessors with no adequate central control.

The proposed reforms in local tax administration outlined above are of importance not only to the locality but also to the state, both from the standpoint of safeguarding its sources of revenue and also from that of the efficiency of its administrative machinery. Most of the reforms mentioned do not involve central administrative supervision, but, if introduced, they would create conditions upon which such supervision could work with much greater effectiveness than upon those now generally prevalent. To the reforms mentioned, therefore, central administrative supervision should be added in order to create a well-rounded and efficient system, for, as has been said, "the experience of the American states demonstrates beyond all doubt, cavil, or contradiction, that there never was and never can be a generally satisfactory assessment by purely local authorities." [30] Inasmuch, however, as the assessments made by local officers constitute the basis of the local tax as well as of the state general property tax, the localities are directly concerned in the fairness and accuracy of such assessments, and it would therefore be scarcely feasible in most states to place the selection of the local assessors directly in the hands of the central state authorities, for this would be considered by many as too great a departure from the principle of home rule. In order, however, to safeguard the interests of the state and to prevent the virtual nullification of its laws, some degree of central administrative supervision, either direct or indirect, should be established over the local assessor and over the methods of local assessment work.

Central supervision of local assessments has advanced further and more rapidly in those states having permanent state tax commissions. State central agencies having to do with tax matters vary widely in their organization, method of selection and the scope of their powers. Some functions re-

[30] C. J. Bullock, in *Proceedings of the Washington State Tax Conference,* 1914, p. 230.

lating to taxation have been performed in some states for many years by the older state fiscal officers, provided in the constitutions, such as the state comptroller in New York and Maryland and the auditor-general in Pennsylvania. Moreover, permanent boards, having power of directly assessing special classes of property and sometimes having also the power of equalization, have for many years existed in certain states, as in Illinois since 1872. But the permanent state tax commission, properly so called, is of comparatively recent growth and represents a further degree of centralization than was brought about by the older fiscal officers or by the earlier type of board. State central agencies, having to do with tax matters, particularly with the assessment of corporations, have been classified into (a) *ex officio* boards or officials, (b) boards or officials appointed or elected solely for the purpose of administering tax laws, and (c) composite boards, composed partly of *ex officio* and partly of selected members.[31] This classification, it will be noticed, is based merely on the organization or method of selection, and makes no distinction in respect to the powers possessed by the boards. Upon the latter basis, state central tax agencies may be classified into those having (a) power to assess directly certain forms of property not suitable for local assessment, such as corporate property, (b) power of direct assessment and also power to equalize tax assessments generally, and (c) in addition to the above powers, that of exercising supervision over local assessors and assessment work.[32] Permanent state tax commissions, strictly speaking, fall only into the last of these three classes.

The movement for the establishment of such commissions,

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[31] *Report of the United States Commissioner of Corporations on the Taxation of Corporations,* Part V, p. 9.

[32] Cf. S. T. Howe, "The Central Control of the Valuation of Taxable Subjects," in *Annals of the American Academy of Political and Social Science,* March, 1915, p. 120.

with powers greater than those merely of equalization and assessment, came to the front with the creation in 1891 of the Indiana State Board of Tax Commissioners. Similar bodies were established in New York in 1896, in Michigan and Wisconsin in 1899, and the movement has since spread so that at present such bodies are found in more than thirty states, including most of the more important states. In a few states, such as Massachusetts and West Virginia, this body consists of a single official or tax commissioner. In the great majority of states, however, the commission is composed of either three or five members, serving usually for terms of four or six years, and receiving annual salaries varying from $2,000, in Maine and South Dakota, to $6,000, in New York. They are usually appointed by the governor with the consent of the senate, and are frequently also subject to removal by the governor for cause. The more highly paid commissioners are generally required to devote their entire time to the duties of the office. The Massachusetts commissioner, though serving for but a three-year term, is usually reappointed. Short terms, unless accompanied with the practice of reappointment, may interfere with the efficiency of the board. Provisions requiring that not more than one member of the board shall come from the same judicial district of the state and that not more than a bare majority shall belong to the same political party, as found in the act creating the New Mexico commission of 1915,[33] may also seriously interfere with the efficiency of the board. The members of the board should be experts in tax matters, and should be appointed without regard to their party affiliations or local residence.

The powers exercised by permanent state tax commissions vary widely. As already pointed out, the functions of direct assessment of corporations and of equalization are usually conferred upon the commissions, though, in certain in-

[33] New Mexico Session Laws, 1915, Ch. 54.

stances, one or both of these functions may be exercised by some other agency, of which the tax commission may or may not be a part.[34] Wide differences in the extent of the tax commission's power are found with respect to the measure of supervision or control which it exercises over local assessors. The largest powers are usually found in the case of recently created commissions or those whose powers have been recently amended by law. Only in very few cases, however, are the powers of the commission fully adequate, while some are almost purely advisory. The more important specific powers which have been conferred upon tax commissions by law in various states may be summarized as follows:

(1) Power to prescribe uniform records, blanks, assessment rolls and all other necessary forms for use by local assessors, and to suggest uniform systems of public accounting for local units of government.

(2) Power to exercise a general supervision over the entire administration of the tax laws, to confer with and advise assessors and other local tax officials, and to furnish them with information and instructions relating to the discharge of their duties.

(3) Power to require reports from the local assessors and to inspect and criticize their work, and to require their attendance at state-wide tax conferences.

(4) Authority to investigate assessments and tax conditions generally for the purpose of securing information upon which to base the action of the commission, or to make recommendations to the legislature, and, for this purpose, to subpœna witnesses, take testimony under oath, and require the production of books and papers.

(5) To remove local assessors for inefficiency or derelic-

[34] For example, in New York, the state board of equalization is composed of the state tax commission and the commissioners of the land office. Session Laws 1915, Ch. 317.

tion of duty, or to cause proceedings to be instituted for this purpose and for the purpose of enforcing the tax laws generally.

(6) To appoint county officials or boards having power to assess or to supervise assessments.

(7) To order the reassessment of particular pieces of property or of entire taxing districts.

(8) To equalize the assessment of property throughout the state, or to order a reëqualization of assessments by the county boards.

(9) To assess directly certain special classes of property.

Some of the above powers are found quite generally; others in comparatively few states. Inasmuch as it is scarcely practicable in states of average size for the state tax commission to watch closely the work of all of the hundreds of local assessors, the efficiency of central supervision over such local assessors is increased by the existence of county supervisors of assessors, particularly if the latter are subject, to some extent at least, to direct central control. The direct appointment by the state commission of the hundreds of local assessors is hardly feasible, not only because such a move would have to overcome the weight of popular prejudice in favor of so-called home rule (or home mis-rule) as well as constitutional difficulties in some states; but also because, under present conditions, it is doubtful whether the commission should be burdened with the task of selecting so many local assessors. There would, however, be less objection to, and many positive reasons in favor of, giving the commission the power of removing local assessors in particular cases of flagrant incompetence and the further power of filling the vacancies thus created. If, however, township assessors are abolished and county assessors are given original assessing powers, the problem of state control is simplified. In 1911 Oklahoma abolished her township assessors and township boards of equalization, but the county assessors were made

elective by popular vote. In 1913 county officials or boards with original assessing powers were made subject to direct appointment by state central authority in Ohio and Montana. Two years later, however, this experiment was abandoned in both of these states. A compromise plan was adopted by Maryland in 1914 through the creation of a county supervisor of assessments, who is appointed by the state tax commission from a list of five persons submitted by the county commissioners of each county.[35] It would be preferable, however, to have the county assessor or supervisor of assessments appointed by the county board of supervisors or county commissioners from eligible lists submitted by the state tax commission or state civil service commission. The county assessors in Kansas are appointed by the boards of county commissioners, but are largely under the control of the state tax commission, by whom they may be removed from office for dereliction of duty. In a number of states, the power of the state commission to remove local or county assessors is so restricted that, in actual practice, the effectiveness of central supervision over local assessments is not so great as it may appear from a mere reading of the statutes. Thus, the former State Board of Equalization of Taxes in New Jersey was empowered to remove, upon complaint of the county board of taxation, any local assessor willfully failing to comply with the laws of the state relating to the assessment of taxes.[36] On account, however, of the practical difficulties in the way of proving willful negligence on the part of local assessors in the discharge of their duties, cases have occurred in which the Board found itself unable to apply a remedy in the face of gross incompetence and manifest favoritism on the part of local assessors.[37] The Wisconsin in-

[35] Maryland Laws, 1914, Ch. 841.

[36] N. J. Laws: Act of April 14, 1906, Sect. 11.

[37] *Proceedings of Fourth Conference of National Tax Association, 1910*, p. 360.

come tax assessors, who also have supervision over local assessments, are appointed by the state tax commission and are also subject to removal or transfer by the commission for adequate cause. This plan, which was introduced as a by-product of the state income tax law of 1911, has been pronounced "the first attempt on American soil to carry out the taxation of either property or income by means of assessors responsible directly to state control and free from local influence." [38] Centralization through control over county assessors is also found in other states, and the work both of the state commissions and the local assessors is thereby greatly facilitated. Matters of local detail and the close supervision over the hundreds of local assessors can be better attended to by the county tax officials, thus allowing the state commission to devote its attention more fully to general supervision and to the shaping of a broad state-wide policy within the limits of the law. Such specialization of function does not necessarily produce looseness of control over the local assessors if the county official is under the effective supervision of the state body.

The exercise by state tax commissions of the power to investigate tax conditions generally and to make intensive studies of the assessment work in particular localities is important as affording a basis upon which to build up an improved administration of the state tax laws. A central agency for the collection of such information is indispensable, for the localities do not usually have the means of employing the necessary experts, even had they the inclination or power to make extensive investigations. The state commission "represents a joint or coöperative method of doing for the local governments what they cannot afford to do severally and individually. It is the economical way of securing efficient ad-

[38] C. J. Bullock, in *Proceedings of National Tax Association, 1912*, p. 340.

ministration. When properly equipped, it acts as a great central reserve of expert aid." [39]

The advice and help which the commission is able, through its broader outlook and wider information, to give to local assessors may be of considerable benefit in improving the character of local assessments, even if the powers of the commission are merely advisory. But the best results cannot usually be obtained unless the commission has power to insure compliance with its advice and instructions. The power of the former New York State Board of Tax Commissioners to investigate and examine into methods of assessments was described as valueless and its power to advise local assessors as to their duties was declared by the chairman of the board to be a farce, because the board had "no authority to carry its rulings and instructions into effect." [40] Legislatures have generally been slow in granting to state tax commissions adequate powers of enforcing their orders and instructions. A New York law of 1915 creates a state tax department, at the head of which is the state tax commission, consisting of three commissioners, appointed by the governor and senate. The commission is authorized to enforce the use of prescribed blanks by local assessors and to enforce compliance with its instructions. But the act lamely concludes that if the assessors fail to comply with the lawful orders of the commission, the latter, in order to compel such compliance, must apply to the courts for an order to that effect.[41]

The most powerful instrument yet placed in the hands of the state tax commissions, designed to give them control over the work of local assessors, is the power to order a reassessment of particular pieces of property or of entire taxing dis-

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[39] T. S. Adams, in *Proceedings of the Fifth New York State Conference on Taxation, 1915,* p. 20.

[40] T. F. Byrnes, in *Proceedings of the Seventh Conference of the National Tax Association, 1913,* pp. 187-189.

[41] New York Session Laws, 1915, Ch. 317.

tricts. The New York law of 1915, mentioned above, contains a provision for reassessment, but the provision is defective in two important respects. In the first place, the commission has no power directly to order a reassessment, but must apply to a justice of the supreme court, who may issue such an order. In the second place, the reassessment, if so ordered, is to be made by the same assessors who made the original assessments. Much more efficacious is the power of reassessment vested in the state tax commissions of Wisconsin, Minnesota, Ohio, Kansas, and a few other states. In these states the commission may, either upon informal complaint of aggrieved taxpayers, or groups of taxpayers, or upon its own initiative, order a reassessment to be made directly by its own agents and in accordance with its own rules. The expense of making the reassessment, moreover, is to be borne by the district concerned. A powerful incentive is thus set at work which tends towards securing equitable and efficient assessments in the first instance. The very existence of the untrammeled power of ordering a reassessment renders its frequent use unnecessary.[42]

The work of state tax commissions has undoubtedly brought about in most states a very decided increase in the percentage of actual assessments to full value. The immediate effect of the establishment of the Kansas Tax Commission in 1907 was the increase of the total assessed valuation of property in the state from $425,000,000 in that year to $2,452,000,000 in 1908, or nearly a six-fold increase. The establishment of tax commissions in other states shows substantial, if not such striking, results. The good effects of the establishment of state tax commissions, however, are not con-

[42] The constitutionality of reassessment statutes has been upheld by the courts in Wisconsin, Michigan and Minnesota. State *ex rel.* Hussey *vs.* Daniels, 143 Wis., 649; State Tax Commissioner *vs.* Board of Assessors, 124 Mich., 491; State *vs.* Minnesota & Ontario Power Co., 141 N. W., 839. Cf. *Proceedings of National Tax Association, 1913,* pp. 174 ff.

fined merely to increasing the aggregate valuations, but are evidenced also in a diminution of the inequalities between taxpayers and tax districts, and a general invigoration of the entire system of tax administration. In some states the work of the commissions has removed the incentive resting upon the assessors of a county to undervalue property in order that the county may bear as small a share of the state tax as possible. Thus, in Washington, the state commission, by making intensive studies of selected pieces of property in a county for the purpose of arriving at their true value and by comparing such value with the assessed value, is able to determine approximately the average percentage of undervaluation of all property in the county. This ratio is used in determining the full value of all property in the county, and upon this basis the state levy is distributed among the counties. Thus, undervaluation profiteth the county nothing, so far as the burden of the state tax is concerned.

For references and collateral reading see end of next chapter.

CHAPTER XI

TAXATION AND FINANCE (*Continued*)

In the preceding chapter we have noted the prevalence and the distinguishing characteristics of the general property tax, the inequalities to which it gives rise, and the principal remedies or expedients which have been adopted for the improvement of its administration. We now turn to a consideration of the steps which have been taken towards the modification, the disintegration, or the abandonment of the general property tax as a source of state revenue.

The general property tax, as we have seen, finds its most suitable application in an agricultural stage of economic development when the mass of property is tangible and but slightly differentiated. During the first half of the nineteenth century the general property tax became nearly everywhere the principal source of state income, yet even at that time the seeds of its disintegration were being sown in the rapid rise of new and important classes of property and in the increasing differentiation of the forms of wealth. Much of this new property was intangible and invisible, yet no general effort was made to change the machinery of administration so as to adapt it to the changed conditions. Special taxes, however, were early levied upon special classes of property, such as banking and insurance corporations. Thus, in 1810, New Jersey made an attempt to tax intangible wealth in the form of bank stock, the president and directors of specified banks being required to pay annually into the state treasury one-half of one per cent upon the paid-up capital stock.[1] In

[1] New Jersey Session Laws: Act of November 2, 1810.

1826 and 1831, respectively, the same state levied a percentage tax upon the gross premiums of foreign insurance companies and upon the capital stock of domestic insurance companies.[2] A tax upon the paid-up capital stock of banking corporations was also levied in Massachusetts in 1812, and in Indiana in 1820. In 1814 Pennsylvania, for the first time, levied a special tax on corporations in the form of a tax on bank dividends.[3] In the case of most of these early special taxes on intangible property, however, no special machinery for the collection of the tax was provided, but the same methods of local administration were utilized as in the case of taxes on tangible property. Naturally, comparatively little revenue was derived from these taxes, but the employment of special taxes distinct from those employed in the taxation of individual property was significant.

After 1830 the property of transportation companies became gradually more and more important among the new forms of wealth having peculiar characteristics distinguishing them from the ordinary property of individuals. In states whose constitutions did not require the uniform taxation of all property, that of railroad corporations was sometimes entirely exempted from state taxation, as an encouragement of the enterprise. Other states gave the railroads the benefit very largely of practical exemption as the result of the attempt to tax them by ineffective methods. At first little differentiation of method is discernible, but railroads, in common with the ordinary property of individuals, were usually assessed by local officials and taxed in accordance with the provisions of the general property tax. As long as the property of railroads, as well as that of other corporations, was almost purely local in character, it was natural that they should be subjected to the general property tax, locally administered. But when,

[2] Acts of December 26, 1826, and January 21, 1831.

[3] *Report of United States Commissioner of Corporations on the Taxation of Corporations,* Part II, p. 64.

with the consolidations and formation of trunk lines after the middle of the nineteenth century, railroads ceased to have a local situs, the division of the responsibility for the assessment and collection of railroad taxes among a large number of local authorities became extremely unsatisfactory. Under this system, or lack of system, in which each local assessor acted as a law unto himself, there resulted a great lack of uniformity and possibility of evasion which cried out for remedy. Similar results also were experienced from the local taxation of other corporations engaged in business operations in more than one locality.

Dissatisfaction with these conditions led to the imposition upon railroad and other corporations of special state taxes as supplementary to, or in modification of, the general property tax, and to centralization in the assessment and collection of such special taxes. Thus, in 1862, Iowa adopted a tax upon the gross receipts of railroads. New York enacted in 1880 a corporation tax law providing for the levying of a special state tax upon the capital stock, gross receipts or other base in the case of the different corporations taxable under the act. New Jersey adopted at the start the policy of levying special state taxes upon railroad and canal companies. Thus, by an act of 1830, such companies were required to pay the state an amount of taxes based upon the number of passengers and tonnage of freight transported, but in 1849 the tax was changed to a percentage tax upon the cost of all railroads having a net income of at least six per cent of the cost.[4] The adoption of each of these special state taxes was accompanied by provisions designed to secure centralization in the administration of such taxes.

It is an important fact to note in the development of the systems of state taxation that, while the general property tax is essentially a locally administered tax, the adoption of spe-

[4] New Jersey Session Laws: Acts of February 4, 1830, and February 22, 1849.

cial state taxes is usually accompanied by an offshoot or by-product in the form of centralized administration. This is especially apt to be true if the property upon which the new special taxes are levied has an extra-local situs, as in the case of most railroads. The conservatism of American state legislatures in tax matters is so deep rooted that definite stimuli, such as the occasion of levying a special state tax and the need for enlarged state revenues, seem to be necessary to overcome their aversion to innovation sufficiently to induce them to introduce centralization in administration. Even when acting under these influences, the legislatures usually embark upon the policy of centralized administration with so much timidity and hesitation as almost to neutralize its effects. Thus, in the case of special state taxes mentioned above, assessment and collection was to be made by the state treasurer in New Jersey and Iowa, and by the state comptroller in New York. Thus, no special state machinery was provided for the performance of the new function, but existing fiscal officers were utilized for the purpose. Moreover, the assessments were to be made upon the basis of the statements of cost, receipts, et cetera, returned by the corporations themselves, and no adequate means was provided for compelling the making of the returns, nor for verifying the returns when made, through inspection of the books and accounts of the corporations. The assessment under these acts, therefore, practically amounted in large measure to self-assessment by the corporations. The results of this feebleness of central control are seen in New Jersey, where disputes frequently arose between the state treasurer and the railroads respecting the amount of taxes due,[5] and investigations showed that mistakes had been made involving the loss of thousands of dollars to the state.[6] These conditions gradu-

[5] Cf. the legislative joint resolution of February 29, 1840.

[6] Message of Governor Newell, appendix to New Jersey House Minutes, 1860, p. 9. By a legislative joint resolution of Feb. 13, 1849, a

ally forced the conviction that existing methods of taxing corporations were inadequate, and that, in order to make corporate property bear its just share of the general tax burden, a greater degree of central control over the administration of the taxes upon such property would be necessary.

The method formerly prevalent of intrusting the assessment of corporations for taxes to the older state fiscal officers or to *ex officio* boards is still found in a few states. Thus, in Pennsylvania, the auditor-general and the state treasurer and, in Delaware, the state treasurer and secretary of state are charged with duties connected with the assessment of state corporation taxes. In Iowa an *ex officio* board known as the state executive council, composed of the governor, secretary of state, state auditor and state treasurer, assesses the property of transportation corporations. A recent special tax commission in that state, however, has recommended that this function be transferred from the executive council to a permanent state tax commission to be created for the purpose.[7] The work of an *ex officio* board, as we have seen, is apt to be perfunctory. Many states, therefore, have from time to time established special state central agencies for the assessment of different kinds of corporations. Thus, in 1873, New Jersey for the first time created a special organ with the function of making an official valuation of the real property of railroad corporations, through the enactment of a provision authorizing the governor to appoint a commissioner of railroad taxation for this purpose.[8] In 1884 a state board of assessors was created in the same state, composed of four members appointed by the governor and senate, to which was

committee was appointed to investigate the charge that the Delaware & Raritan Canal Co. and the Camden & Amboy R. R. Co. had defrauded the state out of large sums due as taxes.

[7] *Report of Iowa Special Tax Commission*, 1912, p. 75. See also criticism of the executive council in "Biennial Message of Gov. Carroll of Iowa," 1913, p. 25.

[8] New Jersey Session Laws: Act of April 2, 1873.

given jurisdiction over the assessment of all property of railroad and canal corporations used for railroad and canal purposes.

The movement towards the creation of permanent state tax commissions, noted in the preceding chapter, has been due in large measure to the need for special state authorities to assess the property of railroad and other corporations. Supervision over local assessments has from time to time, as we have seen, been vested in state central agencies. Such agencies, however, have usually been created primarily for the purpose of making original assessments and administering special taxes upon particular classes of property not suitable for local assessment. The direct or original assessment by state authorities of such special forms of property and the levying of special state taxes upon them generally developed at an earlier date than the supervision of local assessments by permanent state tax commissions. In the large majority of states, such commissions or other state agencies now assess for taxes the property of transportation companies, especially railroads.

Unfortunately, the assessment of corporate property is not always concentrated in the hands of a single state board or official. Thus, some states provide for the "assessment of physical property and franchise value of the same corporations by separate boards. In Kentucky the Railroad Commission assesses the physical property of railroads and the State Board of Valuation and Assessment assesses their franchise value. In Alabama the State Board of Assessment assesses certain physical property of public service corporations and the State Tax Commission assesses their franchise value. In Texas the physical property of railroads is assessed by 100 or more assessors acting independently, the intangible property is assessed by a state board, the rolling stock is assessed by a single county official, and the distribution of rolling stock value is made by a state official, while the state

rate for general taxation is determined by a board created for that particular purpose. Thus, a number of boards and officials are required to perform services which, under a centralized administration, would be more efficiently and economically performed by a single board or official." [9] The tendency, however, is to consolidate related functions in the hands of a single state board. Thus, in New York, corporation taxes were formerly levied and assessed by the state comptroller, but the state board of tax commissioners valued and assessed "special franchises" of certain public service corporations. In 1915, however, the latter body was abolished and most of the powers formerly exercised by the comptroller in connection with the assessment of corporation taxes were transferred to the newly created state tax department.[10] In Kansas, under the law of 1907, the state tax commission is *ex officio* the state board of railroad commissioners, the state board of appraisers and the state board of equalization, and is charged with the assessment of the property of all inter-local corporations.

Not only are the interests of efficiency and economy furthered through the concentration of the various functions connected with the assessment of corporations, but there should also be close coöperation between the state authorities having respectively to do with the taxation and the regulation of public service corporations. The valuation of the property of such corporations by state railroad or public utilities commissions for rate-making purposes involves somewhat different principles from those entering into the assessment of such property for purposes of taxation, but the two problems are in many respects similar, and coöperation between the authorities dealing with them should make for greater effectiveness both in regulation and in taxation.

[9] *Report of U. S. Commissioner of Corporations on the Taxation of Corporations,* Part VI, p. 27.

[10] New York Session Laws, 1915, Ch. 317.

Not only do we sometimes find a division of responsibility between different state authorities in the assessment of corporate property, but also a similar division between state and local authorities. Thus, in Illinois, certain portions of the real and personal property of all railroads, except the Illinois Central Railroad, are assessed by local assessors, while the track, rolling stock and "corporate excess" are assessed by the state board of equalization. General industrial or business corporations are sometimes assessed entirely by local officers. Whatever the character of the corporation, it should be assessed as a unit, in order to take into consideration those intangible elements of value, known as franchise or corporate excess, which exist in addition to the value of the physical property. In the case of corporations whose property is of state-wide extent, local assessors are manifestly not in a position to assess such physical property together with intangible elements of value as a unit. This must be done, if at all, by state agencies, unless, indeed, the Federal Government should undertake it. The expansion of some transportation and transmission systems to almost nation-wide extent points to the need for national assessment. In practice, however, the states apply the unit rule to corporations engaged in interstate business by determining the total value of the system, including property both inside and outside the state, or upon the basis of earnings upon business transacted both inside and outside the state, and levying a tax upon the corporation measured by the proportion of its mileage within the state to its entire length.[11] Even though a part of the corporation's earnings are from interstate com-

[11] The apportionment of mileage within and without the state may be upon the basis of main trackage, or upon that of all tracks, including sidings and spurs. The former method has the sanction of the Supreme Court of the United States, but the advantage appears to lie with the latter. Apportionment may also be made upon the basis of receipts from business transacted within the state as compared with total receipts.

merce, such a state tax apportioned on the basis of earnings merely as a measure of the relative value of the company's property within and without the state, and levied in lieu of other taxes, has been upheld by the Supreme Court of the United States as not an interference with the authority of Congress over interstate commerce.[12]

It is to be noted that the assessment of inter-local property by state authority does not necessarily deprive the localities of revenue from such sources. In many states the taxable values ascertained by state assessment are apportioned among the local taxing districts, in proportion to the mileage within each district, for the computation and collection of the state tax and the local general property tax. In some states, however, the taxes on inter-local corporate property are collected by the state, and a portion of the proceeds distributed among the local taxing districts.[13]

In many states the general property tax at a uniform rate is still the method used for taxing some kinds of corporations. Indeed, the constitutions of many states still require the taxation by a uniform rule of all property, both of individuals and of corporations.[14] In many states, however, the general property tax has been modified or supplemented by the imposition of special state taxes on corporations, differing in form from the taxes laid on individuals. Such special cor-

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[12] Maine *vs.* Grand Trunk Railway, 142 U. S., 217. See also C. C. C. and St. L. Railway *vs.* Backus, 154 U. S., 421; Adams Express Co. *vs.* Ohio, 165 U. S., 194; U. S. Express Co. *vs.* Minnesota, 223 U. S., 335. See also Willoughby, *Constitutional Law of the United States,* ii, p. 723.

[13] In this connection it may be mentioned that the proceeds of the New York Excise Tax on liquor are divided equally between the state and the localities. United States Census Bureau: *Taxation and Revenue Systems of State and Local Governments,* 1914, p. 166.

[14] This provision of the Ohio constitution prevents the imposition of corporation taxes as such in that state, but excise taxes for the privilege of carrying on business may be laid. E. L. Bogart, "Recent Tax Reforms in Ohio," *American Economic Review,* i, pp. 505 ff.

poration taxes are in some states laid on all corporations in general, while in others special taxes are levied upon particular classes of corporations, such as banks, insurance companies and various kinds of transportation and transmission companies. Sometimes the special taxes thus levied are superadded to the general property tax; sometimes they are in lieu of all other taxes.

The principal kinds of special taxes upon corporations are taxes upon incorporation, upon property, upon capitalization, franchises, or corporate excess, and upon earnings or business receipts. Taxes or fees upon incorporation of domestic corporations are found in all the states, and license taxes are usually levied on foreign corporations, but this is as far as uniformity goes. The tax on the property basis is the oldest form and that still found usually in the Southern and Western states. A few years ago Michigan, Wisconsin and New Jersey made an earnest effort to tax railroads on the *ad valorem* basis, and, at considerable expense, made a detailed valuation of the property of railroads within their respective boundaries. In order to be successful, however, this method requires continuous vigor and unremitting vigilance in administration on the part of the state taxing authorities, which cannot always be assumed to exist in most states.

In some states railroad property, instead of being taxed as a unit, is split up into different elements. Thus, in Massachusetts and Illinois, the intangible value known as corporate excess is taxed separately from the physical property. The corporate excess is the remainder found by deducting the assessed value of the tangible property from the equalized market or actual value of the capital stock plus bonded indebtedness.[15] The bonds may, from one point of view, be regarded as a liability, but, for purposes of taxation, they

[15] In Massachusetts, however, bonded indebtedness is not included. United States Bureau of the Census: *Taxation and Revenue Systems of State and Local Governments*, 1914, p. 112.

should rather be regarded as an asset. The taxation of bonds to the corporation is what is known as "stoppage at the source," and may carry with it, as in Connecticut, exemption from taxation in the hands of the holder. In Illinois, however, there is legally double taxation through the attempt to tax bonds both to the corporation and to the holder.[16] The value of the corporate excess tax as a source of revenue is dependent upon the energy with which it is administered by the state tax commissioner or board.[17]

The method of taxing corporations now generally favored in states east of the Mississippi River and north of the Ohio is that upon the basis of earnings or business receipts. Such earnings may be considered theoretically as the measure of the value of the property and the earnings tax, from this point of view, would be merely a roundabout method of assessing a property tax, while avoiding the difficulties of making a physical valuation of the property. In reality, however, the earnings tax departs radically from the *ad valorem* basis and uses income as the test of tax-paying ability. The question arises, however, as to whether net or gross earnings shall be used as the basis of the tax. Theoretically, net earnings appear to be the fairer test of tax-paying ability, for the expenses of different corporations with the same gross income may, of course, vary greatly. In practice, however, a tax on net earnings presents considerable administrative difficulties. There is no clear-cut, ready-made definition of net earnings at hand and it is, therefore, not easy to determine what items should legitimately be deducted from gross

[16] See *Report of the U. S. Commissioner of Corporations on the Taxation of Corporations,* Part iii, p. 62.

[17] A board which has to be compelled by mandamus proceedings to assess the capital stock of corporations as required by law and its own rules, as was the State Board of Equalization of Illinois, can hardly be accused of pernicious activity in the performance of its duties. See Teachers' Federation Case, State Board of Equalization *vs.* People, 191 Ill., 529.

in order to produce net income. Consequently, it might be necessary for the state to prescribe an elaborate system of uniform accounting for corporations doing business in the state, and maintain a watchful scrutiny of such accounts in order to prevent the public treasury from being defrauded through the juggling of expense items.[18] Such supervision of corporation accounts might be well worth doing from the standpoint of regulation, but, from the standpoint of taxation, the expense of supervision might eat up a considerable portion of the revenue from this source. For these reasons, some economists conclude that a gross earnings tax is the only feasible recourse, since the amount of such earnings is easily ascertainable and not readily subject to bookkeeping manipulation.[19] Gross earnings, however, may not be a fair test of tax-paying ability as between two corporations of equal gross-earnings capacity, but whose fixed charges vary widely.

Perhaps a more desirable plan, from some points of view, would be a combination of net and gross receipts as the basis of taxation. In order to avoid some of the administrative difficulties of imposing a net earnings tax, it has been suggested that the principle embodied in the United States internal revenue law of 1864 might be utilized, viz., the imposition of the tax upon the corporation, using the total dividends declared and interest paid as the measure of the tax. In case there should be little or no dividends or interest, a low gross earnings tax might also be imposed.[20] In the taxation of railroads, a combination of the gross and net earnings

[18] In the case of interstate railroads, the state would be saved the necessity of prescribing forms of accounts, as this matter is already attended to by the Interstate Commerce Commission.

[19] C. C. Plehn, "Taxation of Public Service Corporations," in *Proceedings of the First National Conference on State and Local Taxation,* 1907, p. 642; *Report of California Commission on Revenue and Taxation,* 1906, p. 91.

[20] Lawson Purdy, "Outline of a Model System of State and Local Taxation," in *Proceedings of the Providence Conference for Good City Government,* 1907, p. 235.

tax has also been proposed in the form of a "flat rate tax on gross operating revenue, plus a differential on the margin of difference between operating revenue and operating expenses." [21]

Although, as already noted, we find in some states a general corporation tax, the tendency is towards the division of corporations into classes according to the kind of business transacted, and the imposition upon each class of a special tax levied at a different rate or in a different manner. This tendency is accentuated by the adoption of earnings in place of property as the basis of taxation. Under this system even corporations falling into the same general class may be broken up into smaller groups and a different rate applied to each. Thus, in Ohio, public service corporations are divided into subgroups, railroads paying an annual excise tax of four per cent. on their interstate gross receipts, while express and telegraph companies pay two per cent.[22] In adjusting the rate of taxation on public service corporations, it should be borne in mind that a rate which would be confiscatory on one corporation or class of corporations would be fair and reasonable as applied to another. Theoretically, therefore, the best plan might seem to be to allow the rate imposed on each class of corporations to be fixed in the discretion of the state administrative authorities having to do with taxation. Such arbitrary administrative power, however, would scarcely be tolerated in the present state of public opinion, and, under present conditions, this plan would involve great danger of dragging the state administrative authorities into politics. Consequently, reasonable classification of corporations for purposes of taxation should be made by

[21] A. R. Foote, "Taxation of Railroads in the United States," in *Proceedings of the Fifth Annual Conference on State and Local Taxation*, 1911, p. 202.

[22] United States Census Bureau: *Taxation and Revenue Systems of State and Local Governments*, 1914, p. 181.

the legislature in so far as the constitution permits. The taxes levied on public service corporations are uniformly shifted to the public which they directly serve, and it is much more important, therefore, that such corporations should be subject to adequate regulation as to the character of the service rendered than that they should be subject to a high rate of taxation.

The direct or original assessment of corporations by state authorities has tended to set them off as special sources of state revenue. In some states the amount of revenue derived from corporation taxes has increased to such an extent as to constitute a very considerable proportion of the entire revenue of the state. Thus, in 1909, the proportion of state taxes contributed by corporations in New Jersey had reached ninety-two per cent.[23] Other sources of revenue, such as inheritances, where a broad base is desirable in order to prevent great fluctuations of yield, are also better adapted to form state, rather than local, objects of assessment and taxation. Furthermore, corporation charters and the rights of inheritance are derived from the state and, consequently, special duties are owed to the state in return for the enjoyment of these rights. On the other hand, certain forms of property, such as real estate, are more suitable for local assessment and taxation, subject to a reasonable degree of central supervision. These circumstances point to the existence of a natural distinction between the proper sources of state and local revenue, and explain a tendency discernible in many states towards an actual separation of such sources. In some states, such as New York, New Jersey, Pennsylvania, Vermont, Connecticut and California, the amount of revenue de-

[23] Out of a total revenue of $8,637,000, corporations paid into the state treasury $6,781,000, or 78 per cent. Deducting the receipts from sources other than taxes, the proportion of state taxes contributed by corporations was 92 per cent. Report of State Treasurer, 1909 (N. J. Legislative Documents, 1909, i, p. 17).

rived from sources set aside as special objects of state taxation has been so large as to enable those states to dispense almost entirely or altogether with any direct property tax for general state purposes.[24] In some states, therefore, segregation of sources of revenue has actually been achieved. The principal sources reserved for state taxation are banks, insurance companies, public service corporations, inheritances and income. A proper separation should be based upon an allocation to the state of those objects of taxation which can be more efficiently assessed by state than by local authority and to which may be applied the method of taxation on income or earning capacity, while property taxes which cannot easily be administered uniformly over a large area should be reserved to the localities.

Separation was formerly regarded by some as almost a panacea for all the ills of state and local taxation, but relatively less importance is now attached to it. Whether it should be introduced in any particular state depends to a considerable extent on the conditions in that state. In some states it is doubtful whether there are a sufficient number of segregateable sources to make its introduction feasible. In some of the states where it has been introduced, such as Vermont and California, there has been complaint that the sources of revenue allotted to the state are not sufficient for its needs.[25] Connecticut, which had progressed toward separation to such an extent as to abandon a direct state levy, found it necessary to reintroduce it in order to gain sufficient revenue. On the other hand, it is argued that, if the property of public service corporations is reserved exclusively for state taxation, the localities will be left without sufficient

[24] The Pennsylvania tax on the capital stock of corporations, which in 1909 yielded nearly $10,000,000, is probably the most productive single tax levied in any of the states.

[25] *Report of Vermont Commissioner of Taxes*, 1912, p. 16; Biennial Message of Governor of California, 1913, p. 17.

revenue or else the burden of taxation upon local property-owners will be disproportionate in comparison with the burden of taxation on the property reserved to the state. This objection, however, may be overcome by a distribution of a portion of the proceeds of state taxes among the localities in which they are collected. This would be a species of equalization. The advantage of separation lies not so much in the allocation of certain objects for state taxation as in the assessment by state authority of state-wide or inter-local property.

Among the advantages which have been urged in favor of separation are that it will reduce the burden of local taxation by abolishing the state surtax upon local property, and that it will secure greater equality of assessments as between different taxing districts because the incentive to undervalue property in order to bear as small a proportion of the state tax as possible will be removed. In practice, however, neither of these expectations appears to have been realized. The state surtax is a relatively small part of the total tax on local property, and its abolition appears to have little effect on the tendency to undervaluation, which may be largely due to other influences. Under the system of separation, however, undervaluation by local assessors is no longer of importance from the standpoint of state finance. Separation renders equalization between counties unnecessary, though it may still be required as between individuals and between taxing districts within the county.

An objection to separation upon which considerable stress is laid is that it leads to extravagance in legislative appropriations.[26] It is argued that since, as a result of separation, the state derives the bulk of its income from corporations, the direct concern of the individual taxpayer in keeping down appropriations and in the efficient administration of the state's finances is lessened. In the virtual absence of a direct prop-

[26] Cf. *Third Report of Kansas Tax Commission*, 1913, p. 13.

erty tax levied by the state, extravagance in the administration of the finances of the state will not directly affect the pocketbook of the individual property-owner, and he will therefore look with comparative equanimity upon such extravagance, and will not attempt to exercise any control over the state's finances in order to check it. The individual property-owner, however, would not in any event be able to exercise, with continuous effectiveness, a control over the financial officers of the state, so as to prevent wastefulness and inefficiency in the collection of state taxes and extravagance in the spending of the public funds. Such control, in order to be continuously effective, ought to be exercised by executive officers who are themselves responsible, either mediately or immediately, to the individual taxpayers. It may be shown that the largest expenditures are found in those states in which separation is farthest advanced, but this does not necessarily prove a causal connection between separation and increased expenditures, for the latter may be due to other causes.[27]

Two further objections to separation may be considered, viz.: that it produces inelasticity in state revenues, and that it leads to decentralization in tax administration. Under the general property tax for state purposes, the varying revenue needs of the state could be met by raising or lowering the tax rate. Where separation has been introduced, however, the revenues of the state will not necessarily coincide with its legitimate needs, but the tax rate upon most of the sources reserved for state use cannot usually be raised or lowered frequently without tending to unsettle business. This objection may be met by finding additional sources of state reve-

[27] This fallacy is apparently committed by Prof. T. S. Adams in his article on "Separation of State and Local Revenues," *Annals of the American Academy of Political and Social Science,* March, 1915, pp. 135-136. It should also be noted that large expenditures are not necessarily evidence of extravagance.

nue, by varying the rate on some of the existing sources, by making the state tax rate high enough to provide a surplus for unforseen revenue needs, or by apportioning an additional tax upon the localities in proportion to their revenues or expenditures.[28] If these measures are not sufficient to produce an elastic state revenue, then separation should be at least partially abandoned, for the activities of the state should not be subject to arbitrary enlargement or restriction in accordance with the proceeds of an inelastic revenue base.

The objection to separation most frequently urged, however, is that it tends towards financial decentralization and disintegration. This objection does not, of course, apply to taxation upon those objects reserved for state use, for here centralization and separation have proceeded *pari passu*.[29] But with respect to the administration of local taxation, it is feared by many that separation will lead to laxness of central control. Local taxing districts will largely manage their own affairs, local assessors will act independently of outside control and the result will be chaos in local tax administration. Theoretically, there would seem to be no necessary incompatibility between separation and centralization in tax administration. "The relegation of the general property tax," says Professor Seligman, "to the local divisions would not in any way conflict with the principle of effective central control over local assessments."[30] Moreover, in practice, some degree of centralization is usually found combined with separation in the same tax system. It must be admitted, however, that separation does not operate directly to strengthen central control over local assessments and it may tend to weaken

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[28] E. R. A. Seligman, "Separation of State and Local Revenues," First National Conference on State and Local Taxation (1907), p. 502.

[29] Cf. S. P. Orth, "The Centralization of Administration in Ohio," *Columbia University Studies*, xvi, p. 445.

[30] *Essays in Taxation*, 8th ed., p. 368.

or make it more difficult. Assuming that this would be the result, it may be answered that, even so, the inefficiency and inequalities in local assessments arising from lack of central control become, with the adoption of separation, matters of little consequence from the standpoint of state finance, for the local assessments are, of course, no longer used as a base of state taxation. If it be thought, however, that the state cannot so easily throw aside its responsibility for securing efficiency in local tax methods, the state may reintroduce a small direct tax on the basis of local assessments. This would not be an abandonment but only a modification of the principle of separation.[31]

Separation may be considered as a method of evading the problem of securing efficiency in local tax methods and of avoiding some of the difficulties which arise from inequalities and undervaluation in local assessments. Another method of accomplishing the same result is not to separate the sources of state and local revenue, but to discard the valuations made by local assessors as the basis upon which the state tax is levied. This necessitates the finding of some other basis for the state levy. Various substitutes might be suggested, but the only one which is of practical importance is that of local revenues or expenditures. This plan involves the apportionment of the amount desired to be raised for state purposes among the several counties or towns in proportion to the respective amounts of county or town revenues or expenditures. This plan was first seriously considered in Oregon, where, in 1907, an act was passed providing for the apportionment of the state tax according to expenditures of counties. This act, however, was set aside by the courts and the plan did not go into operation in that state. Two peculiarities of the Oregon plan were that, in determining the basis of apportion-

[31] Even those who vehemently oppose separation in general admit that a partial separation is undoubtedly advantageous. C. J. Bullock, in *Proceedings of the Washington State Tax Conference,* 1914, p. 229.

ment, certain extraordinary classes of county expenditures were excluded from consideration, and, secondly, the expenditures merely of the counties and not of the local political subdivisions within the counties were taken as the basis. More recently, in 1915, Connecticut has adopted a somewhat similar plan. The legislature of that state provided by resolution that $1,750,000 should be levied on the towns for each of the two succeeding years, which amount should be apportioned to the towns "in the proportion which the total revenue received yearly from direct taxation in each town, including that received by all taxing districts therein, as averaged for the three fiscal years next preceding, is to the total revenue so received for such time as averaged in all the towns." [32]

By the adoption of this plan the state dispenses with the ordinary method of apportionment according to valuation by local assessors, which everywhere is found to breed inequality between taxing districts, and substitutes for it a basis of apportionment which, it is thought, will more nearly approximate the tax-paying abilities of the respective districts. To this plan the same objection may be urged as to that of separation, viz., that it tends towards decentralization by releasing the state from direct concern in the efficiency of local assessments. Furthermore, it may be urged that it will have a deterrent effect on local expenditures without discrimination as to whether they are wise or not. This disadvantage, however, is counterbalanced by the tendency which the adoption of the plan creates towards economy in local expenditures. Moreover, the effect upon local expenditures may be minimized by using the apportionment-by-expenditure plan merely as an emergency or deficiency tax when the state's ordinary revenues from special taxes are not sufficient. A by-product resulting from this plan would be the collection of financial statistics of local political divisions, the publication of which

[32] Connecticut Public Acts, 1915, Ch. 257.

in comparative form would doubtless help to stimulate the local units to put or keep their finances in better shape.[33]

Prominent among existing movements for tax reform in the states is that for a departure from the uniform rule of the general property tax through a classification of the objects of taxation. In the first part of the nineteenth century when property was largely tangible and homogeneous, there was little need for classification, and the uniform rule seemed to be just and equitable. Unfortunately, this rule was crystallized in many of the constitutions, so that, with certain limited exemptions, the legislature has no alternative but to levy taxes at the same rate on all classes of property. Some constitutions, however, usually those adopted before the middle of the nineteenth century, do not forbid classification; while others, beginning with that of Pennsylvania, in 1873, specifically authorize the levying of taxes which shall be uniform only upon the same class. The National Tax Association has advocated the abolition of constitutional restraints upon the reasonable classification of property and has recommended the following as the sole provision relating to taxation which should go into the constitution: "The power of taxation shall never be surrendered, suspended, or contracted away. All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax, and shall be levied and collected for public purposes only." [34] Provisions substantially similar to this have been adopted in the constitutions of Minnesota, Arizona, Kentucky, Maryland, Massachusetts, and other states. Constitutional provisions permitting classification do not prescribe any particular method of classification. If the appropriation

[33] See Report of the Committee of the National Municipal League on Taxation, *Proceedings of the Providence Conference for Good City Government*, 1907, pp. 249-250.

[34] *Proceedings of the Fifth National Conference on State and Local Taxation*, 1911, p. 453.

of public funds can safely be intrusted to the legislature, then that body may properly be given some discretion in determining the methods of raising revenue.

The design of classification is two-fold: first, to bring about real equity where only formal equality now exists, and, secondly, to increase the productivity of taxes on certain classes of property. In general, it is an effort to adjust the rate and manner of taxation to the economic characteristics of the property taxed. This adjustment may take different forms. In the first place, it may take the form of the assessment of different kinds of property at different ratios of assessments to full value. This method has been adopted in Minnesota, where all taxable property is divided into four groups, and each group is assessed at a different fraction of full value, and the same rate of taxation is then levied upon each group. In the second place, different rates of taxation may be levied upon different classes of property, or some classes may be exempted from taxation altogether. The classification should not, of course, be an arbitrary one, but should be based upon a genuine distinction, and a uniform method and rate should be applied to all objects properly falling within the same class. The economic characteristics of certain kinds of property, such as mines, forests, household goods, money, credits, and other intangible personalty naturally place them in separate categories.

One of the best known examples of the beneficial results of reasonable classification is found in the low tax levied on certain forms of securities in Maryland, Pennsylvania and other states. This form of property cannot stand the high rate usually levied under the general *ad valorem* system, and consequently most of it stays in hiding and escapes the assessor. In 1896, the value of such securities assessed for taxes in Baltimore was only about $6,000,000. In that year a low tax of about four and one-half mills on the dollar was levied on this class of securities, with the result that their

assessed valuation has steadily increased, until in 1915 it amounted to more than $208,000,000.[35] After making due allowance for natural increase there still remains a considerable margin which represents the efficiency of classification in reaching this class of property. A similar result was reached in Minnesota, where, in 1911, a low tax of three mills on the dollar was levied on money and credits. The revenue from this source thereupon increased from $379,000 in 1910 to $590,000 in 1914. The state of Washington has gone still further, and exempted money and credits from taxation altogether. In a number of states mortgages are exempted from taxation, and, when taxed in others, it is usually found that the burden of the tax rests upon the mortgagor and not upon the mortgagee, the amount of the tax being included in the interest charge. This amounts in effect to double taxation upon the borrower in those states where no deduction for indebtedness is allowed.

In order to avoid some of the difficulties experienced in the taxation of mortgages, New York adopted in 1906 the plan of levying a recording tax upon mortgages at a low rate. As originally enacted, the law provided that the tax was to be paid once for all at the time of recordation and the mortgage was thereafter exempt, no matter for how long a time it might run. New York has also provided for the exemption of secured debts after the initial payment of a small tax. The New York mortgage-recording and secured-debts taxes have been copied in other states, but in the latter states the better plan is usually followed of adjusting the amount of the tax to the duration of the mortgage or debt.

These taxes are examples of new special taxes which the states have recently adopted as independent sources of revenue. The most widespread example, however, of such spe-

[35] A. C. Girdwood, "Taxation of Intangible Personal Property in Maryland," in *Addresses and Proceedings of the Fifth New York State Conference on Taxation*, 1915, p. 264.

cial state taxes is the inheritance tax, which has now been adopted in about forty states. In most of these states the tax is a graduated or progressive tax and rests upon the estates of decedents passing both to direct and to collateral heirs. In other states, however, collateral inheritances only are taxed. In 1913 the total yield from this tax in all the states having it was only about $26,000,000, or less than one-fifth of the amount that Great Britain raised from this tax in the same year. The scantiness of yield is due in part to the low rate, partly to the high exemptions, and partly to difficulties of administration in connection with the estates of non-resident decedents.

Many of the new special state taxes, such as the low tax on intangible wealth, represent an attempt to reach the income of property as the basis of taxation rather than the property itself. Theoretically, a state income tax is the least objectionable form of state taxation, for income is usually a better test of tax-paying ability than property. In practice, however, the state income tax has hitherto been an almost uniform failure. A number of American states have at various times levied income taxes, but the yield therefrom has in almost all cases been negligible.[36] The tax was opposed on the ground that it was too inquisitorial, but the principal difficulties in the administration of the tax have been due to the lack of central control of the assessments and to limitations of state jurisdiction with respect to incomes of non-residents and incomes derived from extra-state sources.

The verdict that the income tax, while good theoretically, is impossible practically, must be revised in view of the successful operation of the Wisconsin income tax law of 1911.[37] Among the principal features of this law are that the tax is

[36] See D. O. Kinsman, "The Income Tax in the Commonwealths of the United States," *Publications of the American Economic Association,* November, 1903.

[37] Wisconsin Session Laws, 1911, Ch. 658.

levied upon both individuals and corporations, and that it was introduced as a substitute for the tax on intangible personalty. Taxes upon tangible personalty may be deducted from the amount of the income tax to be paid. The most interesting feature of the law, however, and that which distinguishes it from other state income tax laws, is the provision for central control of assessments. The administration of the law is placed in the hands of the state tax commission, which appoints, subject to civil service regulations, the income tax assessors in each of the forty-one assessment districts into which the state is divided. It is this feature of centralized administration which has saved this law from the same fate as has befallen the other state income tax laws. In the first year of the administration of the law it yielded a revenue of about three and one-half million dollars. A large part of the proceeds is distributed among the counties and local taxing districts. The enactment of the Federal income tax law of 1913, instead of interfering with the operation of state income tax laws, may strengthen their enforcement by making available for the use of state authorities the information contained in the schedules filed under the Federal law.[38] It may be doubted, however, whether it is worth while to maintain two expensive organizations or administrative staffs for the performance of the same function. If the United States Government can administer an income tax more efficiently than the states, the wiser plan might be for the national authorities to assume the administration of the entire income tax system, a part of the proceeds to be apportioned to the states. The same consideration applies to the inheritance tax, should the United States Government decide to levy one.

[38] Connecticut has enacted an income tax on corporations, to be based on the returns required by the Federal Government. Conn. Pub. Laws, 1915, Ch. 292. A New York tax commission has proposed (1916) an income tax to be assessed by the state and the proceeds to be distributed to the local districts in proportion to the assessed value of real estate locally assessed.

Many of the difficulties experienced in the operation of state tax laws are due to the fact that the state is attempting to tax objects which are interstate or nation-wide in character. The economic life of the nation is no respecter of state lines. Railroad systems and large industrial corporations operate in many states. This suggests the need for coöperation in tax matters between the various states concerned, or, better still, coöperation between the states and the Federal Government. The latter government is better fitted to administer efficiently a number of taxes now levied by states, such as income, inheritance, and corporation taxes. Just as obvious advantages result from state assessment of inter-local property, so similar advantages would be derived from national assessment of interstate property. Since the states, however, could not well afford to be deprived entirely of the revenue from these sources, a portion at least of the proceeds would have to be distributed among them. "If the national government were to levy both a direct and a collateral inheritance tax at even one-half the rates found in England before the war, and if it were to return forty per cent to the states, not only would the national government have an additional hundred millions of revenue, but the states would receive two or three times as much as they are now able to secure from this source. In other words, a national inheritance tax, with an equitable division of the yield, would benefit state and nation alike and would go far to solve our most pressing fiscal problem." [39]

State Supervision of Local Accounts.—We have seen that, inasmuch as the state general property tax is tacked on to the local taxes, the states have a direct interest in local tax

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[39] E. R. A. Seligman, "A National Inheritance Tax," *New Republic,* March 25, 1916, p. 213. See also the same author's articles on "The Relations of State and Federal Finance," in *Addresses and Proceedings of the Third International Conference on State and Local Taxation,* 1909, p. 213, and in *North American Review,* November, 1909.

administration and have therefore created some degree of central supervision over local assessments. The states also have an interest in the accuracy of local accounts and in the efficiency of local financial methods. Numerous cases of fraud and embezzlement in the management of public funds by local financial officers have occurred from time to time in different states. To these conditions the state government cannot be indifferent, not only because of its general interest in all that affects the financial well-being of the local governments within its borders, but also because lax, inefficient or fraudulent methods on the part of local financial officers may adversely affect the state's own revenue. Some taxes, particularly the state surtax on the general property basis and also usually the inheritance tax, are collected in the first instance by local officials and pass through the hands of county officials, by whom they are transmitted to the state treasury. State audit of local accounts, therefore, is desirable in order to safeguard the interests of the state itself.

The original, and still largely prevalent, method of exercising state control over local finances was through the mere enactment of constitutional and statutory provisions, without the use of administrative supervision. This is still generally true in respect to the incurring of debt by local governments. In some states, however, such as Texas, Massachusetts, and Oklahoma, some degree of administrative supervision over local debts is exercised through the provision requiring that cities issuing bonds shall have them certified by the state auditor or other state bureau or official. Within the last few decades, moreover, state administrative supervision over local accounts has developed in many states.[40] Such supervision

[40] The history of this movement is traced by J. A. Fairlie in his *Local Government in Counties, Towns and Villages,* pp. 255-263. See also F. N. Stacy, State Supervision of Public Accounting in Minnesota, *Proceedings of the Minnesota Academy of Social Sciences,* 1909, iii, pp. 136-148.

is sometimes exercised by the existing state fiscal officers, such as the comptroller or auditor; sometimes a special officer or board is created for the purpose. The powers of the state administrative authority vary considerably. Sometimes they are very slight, consisting merely in the function of recommending a system of uniform accounting when requested to do so, or of examining the local accounts and making suggestions as to desirable changes in form or method, or of receiving reports and publishing them. In other cases, however, the power of the state bureau or department is mandatory. In Massachusetts the idea has been followed that the initiative should come as far as possible from the localities, and that the function of the state is merely to serve as a central reservoir or clearing-house of information in regard to the financial statistics of the local subdivisions.[41] In 1906 the Bureau of Statistics of that state was authorized to collect and publish in understandable form the financial reports of such subdivisions, and in 1910 the further power was given of auditing local accounts and installing accounting systems, but only upon petition of the city or town concerned. This power is also possessed by state authorities in other states. The New York state comptroller, upon application from local units of government, may install therein a uniform system of accounts. The Wisconsin Tax Commission is also authorized to collect financial reports from the local political subdivisions of the state and may, upon application by any such local unit, install a system of uniform accounting, which is thereupon binding upon the local government. Such accounting systems have now been installed in about one-third of the counties and in a number of cities, towns and villages. The

[41] Cf. C. F. Gettemy, "The Function of the State in Relation to the Statistics of Municipal Finances," *Publications of the American Statistical Association*, 1912, xiii, p. 348 ff. It is to be noted that the function of collecting and disseminating information is also performed by the United States Census Bureau, which publishes at intervals the financial statistics of state and local governments.

Commission may also audit the accounts of any local subdivision upon its own initiative. The expense of the audit or of the installation of accounts rests as a charge upon the local unit of government. The operations of the Wisconsin Commission have disclosed a number of irregularities and defalcations not before known to the public, and have doubtless prevented others from occurring. In some states, such as Ohio, Indiana, and the Pacific Coast states, more mandatory powers of control over local accounts are vested in state authorities. The Ohio Bureau of Inspection and Supervision of Public Offices, created in 1902, and consisting of the auditor of state and three deputies, has power to formulate, prescribe and install a uniform system of accounting and reporting for all public offices and to make periodical examinations of the financial affairs of such offices.[42]

State Accounting Methods.—In many respects the methods of keeping state accounts are less advanced than in the case of private and municipal corporations. The public funds are in charge of the state fiscal officers, the state treasurer and the auditor or comptroller, who are provided for in the constitution, selected usually by popular vote, and frequently have no special expert qualifications for the performance of their duties. The methods of handling the public funds still show in many states traces of the primitive conditions which existed before the middle of the nineteenth century. Some of the state revenues are usually collected by local officers and transmitted by the county collector or treasurer to the state treasury. The expense of collecting the revenue in this way sometimes consumes a large percentage of the gross proceeds. Greater and more effective state administrative supervision

[42] For further information regarding state supervision of local accounts, see the table published in the *National Municipal Review,* ii, pp. 522-525; and J. E. Boyle, "County Budgets: Economy and Efficiency in Expenditures," in *Annals of the American Academy of Political and Social Science,* xlvii, pp. 199, 203.

over the records and accounts of local officers intrusted with the collection of state taxes is needed in the interests of economy and efficiency. Other state revenues are paid directly to state officers charged with receiving them. They do not, however, in all cases go directly into the state treasury. Different state officers, having primarily other than financial duties to perform, such as the secretary of state, the insurance commissioner, the attorney-general and various examining and licensing boards, frequently have financial functions also through their power to collect certain state taxes or to collect fees for the services which they perform. In some states, such as Illinois, all such fees are required by law to be paid into the state treasury, but in other states they are utilized in paying the expenses of maintaining and operating the respective offices, and only the remainder, if any, is paid into the state treasury. The revenues received from various sources are covered into the treasury and placed either in a general fund or in special funds. When placed in a special fund, the money cannot ordinarily be used for any other purpose, even though there may be a surplus in one fund and a deficiency in another.[43] When the amount of the appropriations for a given fiscal period has been determined, and the amount of the revenue receivable by the state from all sources except taxes (i. e., the direct property tax) is approximately known, the tax rate may then be determined by mathematical computation. In some states the rate is determined by law, but in others by a state board or official. In Illinois, for example, this board consists of the governor, state treasurer, and auditor of public accounts.

The custody of state funds is controlled in the various states

[43] "The existence of funds separate from the general fund, and the commitment of certain revenues of the state to specific classes of expenditures is a confusing and objectionable feature of state finance." See "Annual Message of Governor Whitman of New York," 1916, p. 8; "Message of Governor Withycombe of Oregon," 1915.

in accordance with one or both of two different plans or methods, known as the independent treasury or vault system and the depository system. Under the former, the funds of the state are kept in its own vaults, while, under the latter, they are kept in certain designated banks. During the first half of the nineteenth century the independent treasury system was the more common one, but of late years it has been abandoned in most of the states. An investigation conducted in 1906 by the Washington State Board of Tax Commissioners showed that, at that time, eight states still maintained the independent treasury system, while four kept part of their funds in vaults and part of them in depositories. The rest of the states followed the depository plan. The depositories were named in different ways, sometimes by law, but more often by the governor, treasurer, state board of deposit or other board. In one state the legislature determined the city in which the funds should be deposited, while the governor selected the particular bank in that city. The number of depositories in each state varied from one to about two hundred. In 1906 there were sixteen states, including those having the vault system, which received no interest on the public funds.[44] In the independent treasury states, the states not only derive no interest from the funds, but are put to expense in order to safeguard the money. Furthermore, the funds are withdrawn from circulation. On the other hand, some of the depository states have lost some money through the failure of the banks. This contingency, however, is now generally guarded against by requiring the banks to furnish

[44] "Depository Laws of the Several States," First Biennial Report of the Washington State Board of Tax Commissioners, 1905-6, p. 40. See also E. R. Buckley, "Custody of State Funds," *Annals of the American Academy of Political and Social Science,* vi, p. 397; C. S. Potts, "The Independent Treasury versus Bank Depositories: A Study in State Finance," *Ibid.,* xx, p. 571; E. E. Agger, The Budget in the American Commonwealths, *Columbia University Studies,* xxv, No. 2, Chap. IV, Part III.

adequate security for the safety of the funds intrusted to them.

Some attempts have been made in recent years to bring about a more effective system of accounting in the management of state finances. The development of state supervision over local accounts has had a reflex influence in improving those of the states. Many of the laws providing supervision of local accounts provide also for the inspection of state accounts. The state bureaus of inspection and supervision of public offices in Ohio, Washington and other states have large powers of control over both state and local offices. More than thirty states have now adopted some plan of uniform accounting. Among the recent laws is that of Oregon, which provides that the state insurance commissioner shall formulate and prescribe a uniform system of accounting to be used by all officers and institutions expending state money, and shall also require reports from state officers and employees. He is also authorized to make an annual audit of the books and accounts of each officer and institution spending state money. The failure of any officer to use the system of accounting prescribed by the insurance commissioner, or to report to him as requested, is punishable as a misdemeanor, and may, in addition, be punished by removal from office.[45]

In spite of the progress that has been made, it cannot be said that any state has yet established a central department having adequate powers of control over all the financial operations of the state. Various functions having to do with the state's finances are still assigned to different officers and boards acting more or less independently. The need for a state revenue commission or, better still, a state finance commission with complete authority over all the administrative phases of state finance is coming more and more to be realized. Such a plan has been recommended by the Illinois Efficiency and Economy Committee and indorsed by the governor of that

[45] Oregon Session Laws, 1913, Ch. 286.

state. It provides for the consolidation of the tax levying boards and the revenue collecting departments of the state into a department of finance under the control of a state finance commission, to consist of the state treasurer and auditor of public accounts, *ex officio,* and three members appointed by the governor and senate, to be known as the state comptroller, the tax commissioner and the revenue commissioner.[46]

State Expenditures.—One of the striking phenomena of the present day is the increasing cost of government and the mounting tide of public expenditures. This is especially true in the case of the states, where expenditures have increased during recent years more rapidly than population or than the assessed valuation of property. Campaigns have been waged upon the issue of economy and retrenchment, but administrations elected upon this issue have found themselves powerless to stem the tide toward lavish expenditures. Governors have frequently sounded notes of warning in legislative ears, but without avail. From 1903 to 1913 the total governmental cost payments of the states increased from $186,000,000 to $383,000,000, or 106 per cent, which was a more rapid rate of increase than in the case of either the national or local governments for the same period.[47] The total revenue receipts of the states increased during the same period only 94 per cent. Thus the productivity of existing sources of revenue is increasing less rapidly than expenditures, which necessitates the finding of new sources of revenue or the more economical spending of that derived from existing sources.

The increase of state expenditures does not necessarily indicate the existence of extravagance or useless spending, for the increase in expenditures measures roughly the increase in

[46] *Report of the Illinois Efficiency and Economy Committee,* 1915, p. 180; "Biennial Message of Governor Dunne," 1915, p. 20.

[47] U. S. Census Bureau: "Report on National and State Revenues and Expenditures, 1903 and 1913" (1914).

the activities which the states carry on. Some functions formerly performed, if at all, by the local governments have frequently been assumed by the states, while the latter have also taken on new functions not previously performed at all. At the same time, there has been a rapid extension in the scope of existing state functions. The larger proportion of the state funds are now being expended upon what may be called the developmental functions, such as education and charities. There is, however, a noticeable increase in the sums necessary to carry on the newer regulative functions. Nevertheless, while this increase of expenditures is to a considerable extent due to a legitimate growth of state activities, combined with the increase in the supply of gold and other general causes, it is undoubtedly due also in part to graft, extravagance, uneconomical methods and the multiplication of useless boards and officers. At present much state money is wasted annually through unwise or excessive appropriations. This is due in large measure to the haphazard method of enacting appropriation bills and to the lack of any adequate system of budget making. The waste of public funds, however, cannot be laid entirely at the door of the appropriating authority, but some responsibility for this condition must also be laid upon the administrative disbursing authorities. The unnecessary duplication of labor, the uneconomical purchase of supplies and the mismanagement of administrative work tend largely to increase the high cost of government.

Economy in expenditure cannot be fully attained so long as each state department, board and institution separately purchases its own supplies. The money appropriated for the use of various state institutions has heretofore frequently been more than necessary for the reason that each such institution was allowed separately to purchase its own supplies. Not only did this allow room for occasional favoritism in awarding contracts, without sufficient scrutiny on the part of any central state official, but it also divided the power of spending

the state money into so many hands that higher prices had to be paid for necessary supplies.[48] Moreover, frequently insufficient care was taken in checking up the deliveries of supplies so as to make sure that they were in accordance with the specifications. These conditions, however, have been somewhat remedied by the creation in a number of states of boards of control of all charitable and correctional institutions, thus concentrating the fiscal management of such institutions in the hands of a central body, with the consequent increased economy in the purchase of supplies. In order to secure economy in respect to this class of expenditure as well as to secure a better quality in the supplies purchased, some states have gone a step further by creating a central purchasing agency for the state. New Hampshire and Vermont have provided for the appointment by the governor of a state purchasing agent, whose business is to purchase supplies not only for the state institutions, but for all the departments of the state government. In 1915 California passed a similar statute, which creates the state purchasing department, in charge of the state purchasing agent, to be appointed by, and hold office at the pleasure of the governor. The purchasing agent is empowered, upon the approval of the state board of control, to contract for and purchase all supplies necessary for the proper transaction of the business of each state department, commission, board, institution and official.[49]

The State Budget.—A budget, in the sense in which that term is properly used, may be described as a comprehensive financial program, containing a complete plan of proposed expenditures and estimated revenues for the ensuing fiscal period, submitted by the executive for the approval of the legislative

[48] In New York there are "some sixty-five officers of the state and of its counties who share with the state comptroller and treasurer the control over the expenditures of state moneys." "Annual Message of Gov. Whitman, January, 1916," p. 7.

[49] California Session Laws, 1915, Ch. 351. On the purchase of supplies, see also below, Ch. XIII.

branch of the government. As long as the expenditures of the state governments were comparatively low, no great need for such a budget scheme was generally felt. But when, in recent years, expenditures mounted so high as to make insufficient the existing sources of revenue, the attempt has been made to seek relief not only through the creation of new sources of revenue, but also through a more unified control over expenditures and a more systematic correlation of expenditures and revenues. The initiative in matters of appropriation has heretofore been largely in the hands of legislative committees, each committee considering separately and without adequate publicity a particular field of expenditures. Under these conditions, the pressure of local interests and log-rolling methods of legislation inevitably produce waste and extravagance in the expenditure of the public funds. The only apparent escape from this evil is by placing the initiation of the budget in the hands of the chief executive, who represents the state as a whole and general, rather than special or local, interests.

The positive legal power of the governor to initiate a budget has been greater than his actual exercise of power. A number of state constitutions authorize him to submit "measures" for the consideration of the legislature, while others provide more specifically that he shall present to that body at the beginning of each session "estimates of the amount of money to be raised by taxation for all purposes." [50] Such provisions, however, have either been ignored or utilized in a merely perfunctory manner. This is probably due in part to the disintegration of state administration. The independence of the various state administrative officers from control by the governor enables them to ignore him and to go directly to the legislature with their requests for appropriations. Those administrative officers who are closely allied politically with the party or faction having control of the appropriation commit-

[50] e. g., Constitution of Illinois, Art. V, Sect. 7.

tees are naturally more likely to have their requests granted, without regard to their real needs. This practice is out of harmony with the principles of orderly administration, and entirely incompatible with the making of a scientific budget. The comparatively short term of the governor and his election in the even years are conditions which also adversely affect the strength and continuity of the governor's control over the budget. If the governor is to be given the power to prepare and transmit to the legislature a budget, he should be allowed sufficient time in which to prepare it before it comes up in the legislature. In order to effect this object, it has been recommended that the governor be elected in the odd years so that he may have the advantage of at least a year in office before the legislature meets, unless an emergency should require a special session to be called.[51]

The initiative in determining the amount and objects of state expenditure has hitherto lain largely with the legislature. This power has made that body, rather than the governor, the central controlling power over the administration. The appropriation bills have sometimes gone into minute detail, thus giving the legislature a close and intimate control over the administrative services. While some control should be exercised by the legislature over expenditures by the administrative officers in order to prevent abuses which might otherwise arise, such control should be exercised by legislative provision for careful audit of executive accounts and by full publicity as to expenditures, rather than by the device of an elaborately segregated budget. The administrative officers, by reason of their experience in the carrying on of administrative work, are in a better position than the legislature to draw up the estimates of funds needed for the support of such work.

[51] *Report of the Economy and Efficiency Commission of the Commonwealth of Pennsylvania,* 1915, p. 6. To this plan, however, it may be objected that if the governor and legislature are elected at different times, they are less likely to be in political harmony.

Lump sum appropriations give greater independence to the administrative officers, and tend to increase administrative efficiency and to prevent logrolling methods in the legislature. Such administrative independence is not dangerous if combined with a proper accounting system for holding the disbursing officers responsible.

Again, the governor has been confined to the negative function of vetoing items, or, in one or two states, of reducing items in appropriation bills. The veto power alone has proven to be an insufficient instrument to enable the governor to construct a complete financial program. He does not usually have sufficient time or information to do more than lop off such of the seemingly more needless appropriations as may be necessary in order to keep within the estimated revenues. Some improvement has been made in recent years, however, through the enactment of laws designed to put in motion administrative agencies for collecting and compiling estimates and transmitting them to the legislature for its information. Thus, the Illinois law of 1913, establishing the legislative reference bureau, provides as one of the duties of such bureau, that of causing to be "prepared, printed and distributed for the use of the members of the General Assembly, a detailed budget of the appropriations which the officers of the several departments of the state government report to it are required for their several departments for the biennium for which appropriations are to be made by the next General Assembly, together with a comparative statement of the sums appropriated by the preceding General Assembly for the same purposes." [52] Somewhat similar laws have been enacted in other states. Thus, in the same year, Oregon pro-

[52] Illinois Session Laws, 1913, p. 392. It is to be noted, however, that the Illinois legislative reference bureau is not strictly an administrative agency, since it is largely under the control of the legislature, and, furthermore, the so-called budget mentioned in the act is not strictly a budget, as it makes no provision for a statement of estimated revenues.

vided by law that all departments and institutions should biennially file with the secretary of state statements showing the amounts appropriated for the current and next preceding biennial period, the amounts required during the ensuing biennial period, and estimates of probable revenues of each such department or institution for the ensuing biennial period. The statements were then to be tabulated by the secretary of state and transmitted to the governor and members of the legislature, and upon the basis of such tabulation, the governor is in a position to make recommendations to the legislature.[53] Similarly, the Massachusetts Commission on Economy and Efficiency was created in 1912 with power to inquire into the laws governing the financial transactions of the commonwealth, to scrutinize the estimates of the various departments and institutions and to make recommendations to the governor and council and the general court.[54]

Although such laws constitute a step in advance, they are seriously deficient in that they provide in the main merely for the collection and transmittal of financial information to the legislature, and have no binding force upon that body. Moreover, they do not, as a rule, represent the authoritative recommendation of a responsible state officer, based upon a broad survey of the financial needs and resources of the state. Furthermore, the estimates, as transmitted to the legislature, are based almost entirely upon the statements of financial needs made by heads of departments and other administrative officers, without adequate and disinterested examination by experts outside the departments concerned. The need for an intelligent revision of the departmental estimates, based upon accurate information, was provided for in the Ohio law of 1913, under which the governor appointed a state budget commissioner with a number of assistants, having ample power to examine officials and to compel the produc-

[53] Oregon Session Laws, 1913, Ch. 284.
[54] Massachusetts Laws of 1912, Ch. 719.

tion of books and papers so as to secure the necessary information.

The effectiveness of a budget prepared under administrative supervision and transmitted by the governor to the legislature depends to a considerable extent upon the relations between the governor and the legislature. Even if the budget so transmitted has no legally binding force upon the legislature, it may be very effective if the governor is recognized as the political leader of the party in control of the legislature. Under these circumstances, greater weight will naturally be attached to his recommendations and more effective coöperation between the executive and the legislature will be possible. Some states have attempted to give a legal sanction to such coöperative action by providing that the budget shall be drawn up by a board composed of members of both the legislative and executive branches of the government. Laws providing for such joint action have been enacted in Wisconsin, Vermont, New York, Connecticut and other states. Thus, in Connecticut, a state finance board is established, composed of the state treasurer, comptroller, and tax commissioner, *ex officio,* and three appointees of the governor, which receives estimates from the various departments and institutions. There is also created a joint standing committee of the legislature which meets with the state finance board during the sessions of the legislature. All appropriation bills are to be referred to the joint body for its recommendations and it may also originate such bills it deems necessary.[55] Such a method of joint action fits in, perhaps, with less disturbance to the general framework of state government than a purely executive budget, but its effectiveness depends on the existence of special conditions, which cannot always be expected. The New York State Board of Estimate, created in 1913, and composed of the governor and other state executive officers and chairmen of legislative committees

[55] Connecticut Public Acts, 1915, Ch. 302.

together with the commissioner of economy and efficiency,[56] did not work so well as to justify the conclusion that such an arrangement is always feasible.

The comparative ineffectiveness which has been experienced in the operation of most of the schemes for a state budget hitherto adopted has gradually led to the conclusion that more radical changes are necessary in order to accomplish a real reform. In countries having a real budget, such as Great Britain, the Cabinet officers are in practically complete control of the finances, and the executive exercises such control in some of the large cities of America. It is to be remembered, however, that in Great Britain the Cabinet officers having charge of the finances are also members and leaders of the legislature. On account of the prevalence of the principle of separation of powers in the organization of our state governments, it would scarcely be feasible at once to transplant British budget methods to the American states. A greater measure of executive control than is now usually found is, however, both feasible and desirable. Even the principle of separation of powers itself requires that the executive department should not be forced by the legislature to spend more money for the performance of its functions and services than the executive deems necessary for the purpose. Therefore, the legislature should not be allowed, except, perhaps, by an extraordinary vote, to increase items in the appropriation bills for the support of the executive services beyond the amounts recommended by the executive department.

Several years ago the People's Power League of Oregon pointed the way toward a reform of budget procedure through its proposal that the governor be given a seat in the legislative assembly and be vested with the exclusive right of introducing all appropriation bills, subject to the right of the assembly to reduce but not to increase the amount. Some

[56] New York Session Laws, 1913, Ch. 281.

features of this plan were embodied in the budget scheme contained in the proposed New York constitution of 1915. According to the latter plan, it was provided that the governor should submit at each session of the legislature a budget containing a complete scheme of proposed expenditures and estimated revenues. After submission, but before final action by the legislature, the governor might amend or supplement the budget. In respect to the consideration of the budget by the legislature, the proposed constitution laid down three important rules: first, the governor and the heads of departments should have the right, and it should also be their duty when requested by either house, to appear and be heard in respect to the budget during its consideration and to answer questions in regard to it; second, except in respect to appropriations for the legislature and the judiciary, the legislature could not alter an appropriation bill submitted by the governor otherwise than by striking out or reducing items therein; third, neither house could consider further appropriations until the appropriation bills proposed by the governor should have been finally acted upon by both houses. The final action of the legislature in passing upon the estimates for the executive department would carry such provisions into effect without further action by the governor, as his approval or veto would be unnecessary in such cases. This budget plan, had it been adopted, would have introduced a very decided improvement over the present lack of system.

Probably the most promising state budget plan yet brought forward in this country is that proposed in 1916 by the Goodnow Efficiency and Economy Commission of Maryland. It embodies the main features of the budget plan contained in the proposed New York Constitution, but works out more carefully and more in detail the respective functions of the governor and the legislature. It provides for effective administrative supervision over the estimates and gives the governor the power to determine the maximum amounts that may be

spent for the support of the state executive departments, boards and institutions. The estimated amounts necessary for the support of the judiciary and legislature are certified to the governor by the state comptroller and the presiding officers of each house respectively, and are inserted in the budget by the governor without revision, but public hearings are to be held on all estimates. The legislature may strike out items or reduce, but not increase, the amounts proposed by the governor for the support of the executive department; it may increase but not reduce those proposed for the support of the judicial department; and it may either increase or reduce the estimates for the legislature. Moreover, while the legislature may not consider other appropriation bills until the governor's budget bill has been finally acted upon, it may subsequently initiate appropriations for objects not included in the governor's budget. The exercise of this power, however, is attempted to be safeguarded from abuse by the following conditions: It can only be exercised by a three-fifths vote; it is subject to the usual power of the governor to approve or veto; and the special appropriation bill must be accompanied by provision for the levy of a tax sufficient in amount to defray the expenses necessitated by such act of appropriation. If the governor's budget bill has not been acted upon by the legislature before the end of the regular session, the governor may extend the session for such further period as he thinks necessary, and during such extension of the session no matter other than such bill may be considered.

This plan is by no means perfect. But, by giving the legislature greater power over the estimates for the legislative and judicial departments than over those for the executive departments, it recognizes the principle of separation of powers. At the same time, it tends to increase the governor's control over the finances of the state as compared with that which he now possesses, and thus, through concentration of

responsibility, may operate to bring about a very decided advance towards a scientific budget system.

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CHAPTER XII

THE ADMINISTRATION OF EDUCATION

Under a democratic form of government, education must be regarded as of peculiar importance owing to the need that popular control of public policy may at the same time be intelligent. Judged both from this point of view and from that of the relative amount of public expenditure therefor, the administration of education is by far the most important function performed by the American states. In 1913, slightly more than one-third of the total governmental cost payments made by the states for all purposes went to the support of education.

The administration of education differs from that of taxation in that it is not exclusively a state or public function, but is carried on partly by private agencies. Indeed, at the beginning of the history of the states, education was considered as largely, if not entirely, a matter for private initiative and management. It was only by a gradual process that the people became accustomed to the idea of public schools, supported and controlled by the state or local units of government. The instrumentalities of public education at first established were mainly elementary schools only, for many persons were still unconvinced that the people in general should be taxed for the support of higher institutions of learning, which could be attended by the sons and daughters of only a small proportion of the taxpayers. This stage in the evolution of public opinion, however, has now been passed and most states make provision for the carrying on of higher education. A study of public educational administration involves a consideration of the organization and functions of the authorities and agencies, state and local, which

are charged with carrying on such administration, together with the relations existing between them, and the extent and methods of governmental supervision over certain important educational processes. In legal theory, public education has been generally recognized as peculiarly a function of the state, rather than of the national or local, governments.[1] Nevertheless, it is scarcely possible to avoid giving considerable attention to local educational agencies, both on account of the large share of control and management over schools left to the localities, and also on account of the importance of the relations existing between the local and central educational authorities.

The local units of government utilized for the carrying on of public education are the school district, the township, the municipality, and the county. City schools are more efficient and more highly developed than those of the rural districts, and have consequently not been brought under higher administrative supervision to as great an extent as have the rural schools. Of the other three units of local government, two or all of them are frequently found exercising some powers pertaining to public education. As a rule, however, some one of these units stands out conspicuously as the primary unit of educational organization. Thus, the New England states, together with a few states in other parts of the country, are under township organization. In the South, on the other hand, the county is the unit of educational organization, while in other parts of the country, the school district occupies this position.

The school district is the oldest and smallest unit of local school administration. Originating in Massachusetts, it spread westward with the general movement of population. It was adopted in New York in 1795, in Ohio in 1821, in Illinois in 1825, and, although now abandoned in New England, it is still

[1] State *vs.* Haworth, 122 Ind., 462; Fuller *vs.* Heath, 89 Ill., 296; Gunnison *vs.* Board of Education of City of New York, 176 N. Y., 11; quoted by T. E. Finegan in *Proceedings of the National Education Assn.*, 1913, p. 123.

found, either wholly or partially, in almost thirty states. In some of the larger states, such as New York and Illinois, the number of school districts is between ten and twelve thousand. The school district is ordinarily a body politic and corporate. A district board composed usually of three directors or trustees is elected by the voters of the district, and to this board the management of the district school is entrusted, though the voters themselves assembled in annual school meetings sometimes exercise important powers. As a rule, however, the powers of the school district are exercised by the district board as the representatives of the voters. The more important powers and duties of this board are: to have general charge of the school property and equipment; to visit and inspect the school; to appoint the teacher, provided such appointee is properly certificated as required by law; to adopt and enforce all necessary rules and regulations for the government of the schools; and, in some states, to select the textbooks, determine the course of study and, beyond a certain minimum, the length of the school year, and to provide the revenue necessary to maintain schools in the district through the levy of an annual tax upon the taxable property of the district, subject usually to the limitations of state law as to the rate of the levy.

The district system of school organization represents an extremely democratic and decentralized form of control. Under the conditions which existed at the time when the states were first settled, it was doubtless the most feasible method of local school organization. But it is a type of school organization adapted only to primitive conditions and sparsely settled regions. There may be a few parts of the country in which the district system is still that best suited to conditions, but in much the larger portion, such a primitive type of organization has been outgrown. Whatever advantages attach to the district system, and there are some, are greatly counterbalanced by its defects. It necessitates many elections and the crea-

tion of a vast army of local school officials, estimated in Illinois to number about 45,000. This is an average of several hundred to a county, and it is doubtful whether that many competent men can be found in the average county. The large powers of control over the schools granted to each district board of directors makes each district largely independent of other districts and also of the higher control. The very considerable degree of local autonomy vested in school directors regarding many matters, such as fixing the salaries of teachers, often operates practically to defeat the will of the state, as expressed in the Constitution or laws. The district system, moreover, is excessively costly in comparison with the results obtained, because of the large proportionate cost of administration as compared with the township or county system, and it frequently results in inequalities among the different districts, both in the rates of taxation for school purposes and also in the character of the educational facilities provided under it.

No sufficient reason appears for retaining a unit of local government for school purposes distinct from, and smaller than, the units provided for the exercise of other local functions. Moreover, a reduction in the number of school districts through an increase in their size resulting from the adoption of the township or county as the unit would considerably increase the facility and efficiency of state supervision over local school administration. In many school districts, the amount of taxable property is so small that it is difficult to raise revenue sufficient to maintain an efficient school in accordance with the standards set by the state. Furthermore, there are many districts in which the average attendance is so small that adequate grading of the pupils is impracticable, and there seems to be little question that many of the district schools should either be abolished or consolidated with neighboring schools. The Illinois Educational Commission of 1908 thoroughly investigated the district system, and recommended most emphatically that it be abolished, and that the township system be established in

place of it, on the ground that this would open "the way to increased economy and efficiency in the educational work of the state." [2] The township system has now been adopted in Indiana, New Jersey, Pennsylvania and the New England States, and is permissive in some other states. Its essential feature is the management of all the schools in the township by a single board or officer elected by the voters of the township. Among the advantages claimed for the township system are that it is less expensive, it reduces the number of school officials, it tends to the discontinuance of schools that have become too small to be operated efficiently, it prevents the unnecessary duplication of school facilities, and equalizes the burden of taxation.

The adoption of a unit of school administration as large as the township opens the way to the consolidation of schools. It is true that the adoption of the township unit does not necessarily involve either the abolition or the consolidation of any of the previously existing schools, but merely brings about a unification in the management and control of the schools in the township. The result of such unification, however, is usually to create a tendency towards consolidation. The consolidated school system in rural districts is now found in about thirty-five states. In some states, such as Illinois, Wisconsin and Minnesota, the school trustees may close small schools and arrange for the education of the children in neighboring schools. Consolidation of schools in rural districts usually involves the necessity of a provision for transportation facilities at public expense, and this, in turn, emphasizes the desirability of good roads. As early as 1869, Massachusetts authorized school trustees to use public funds for the conveyance of pupils to and from the public schools. Indiana has about 600 consolidated schools and expends nearly half a million dollars a year for transportation of pupils. Even with this

[2] *Biennial Report of the Superintendent of Public Instruction of Illinois,* 1908-10, p. 363.

added expense, however, consolidation of schools proves to be economical, for it involves a lesser total expenditure per unit of educational result. Moreover, it provides better school buildings and equipment and more competent teachers, it facilitates grading or classification of pupils, and enlarges their educational and social opportunities. A number of states undertake to assist in the movement towards consolidation by granting special state aid to consolidated schools or by assuming the payment of a certain proportion of the expense of transporting pupils.

Many of the advantages claimed for the township unit of school administration as contrasted with the district system apply also to the county unit. Almost a dozen states, most of them in the South, have adopted the county as the unit of school administration, while a few others are partly under the county system. In these states the powers of the county educational authorities are naturally greater than in the states not under the county system. In about forty states, however, including nearly all the states outside New England, the county is the unit of school supervision. The educational authorities attached to the county are the county school board and the county superintendent of schools.

A county board with educational functions of some kind is found in about thirty states. In a few of these states, principally in the South and far West, it has general control and management of all the public elementary schools in the county, but usually it is confined to the exercise of some special educational function, such as examining and certificating teachers, and adopting textbooks and courses of study. Some important states, such as Illinois and the New England States, have no county board of education. In those states where such a board is found, its members are usually appointed, either by the governor, the state board of education or other body, or is composed of certain county or local officers acting *ex officio*. In a number of states the county superintendent of schools is

a member of the board, and in a few states he is appointed by the board. In either case he acts as the executive officer of the board.

A county superintendent of schools, or officer holding a similar position, is found in about forty states, including practically all the states outside of New England. In the large majority of these states he is elected by popular vote on the same ticket with sheriffs and other county officers. It may be questioned whether this method of selection secures the best results. It has the practical effect of making residence in the county a necessary qualification for the office, and it may be doubted whether this is wise in all cases. Moreover, popular election has the effect of injecting political considerations into the choice, and disqualifies all, no matter what their educational attainments may be, who do not belong to the dominant political party. The county superintendent should be an expert in educational matters, but popular election is not a method calculated to secure such a person. While popular election is the method still obtaining in the majority of states, a number have adopted the method of appointment, either by a central state officer, or by a county board of education, or a board composed of local school officers. In Pennsylvania, for example, he is appointed by the school directors of each county, and, in Indiana, by the township trustees of each county. The appointment of the county superintendent by the county board of education is probably the method best calculated to insure the selection of a competent person.

One result of electing the county superintendent by popular vote is that he is chosen for a definite term of office, usually either two or four years, and, while there are frequent cases of reëlection, the idea of rotation in office is sometimes applied by analogy from other elective offices and prevent the continuance in office of a competent and well qualified person. In a number of states no definite educational qualifications are prescribed for this office, although such a requirement would not

be legally incompatible with the elective character of the office. The result is that, in such states, it is possible for county superintendents to be chosen who are inferior in scholarship and educational experience to many of the teachers whom it will be their duty to advise and supervise in educational work. The principle, however, of requiring professional qualifications for this officer has been established in many of the most important states, including Wisconsin, Michigan, Kansas, Nebraska, Iowa and Indiana. It is suggested that such qualifications should extend at least as far as the requirement that the county superintendent shall be a holder of a teachers' certificate of the highest grade which he is competent to issue, and shall have had at least two years' experience teaching in the public schools.

The compensation of the county superintendent is paid sometimes from state funds, sometimes from county funds, and sometimes from both. It ranges between certain amounts, depending usually upon the total population or the school-age population of the county. Since, upon this basis, the amount of the salary is definitely fixed, there exists no incentive to a more efficient management of the schools through the prospect of a larger salary to be gained thereby. Moreover, total population is not a very accurate measure of the amount of work and responsibility which devolves upon the county superintendent. A better measure of responsibility would be the number of schools in the county, provided city schools are not counted at full value, on account of the smaller amount of supervision needed over them by the county superintendent. If the total attendance at schools were made the basis, it would be an incentive to the county superintendent to extend educational facilities to as large a proportion of the community as possible. The question is therefore suggested for consideration whether the salary of the county superintendent should not be fixed upon the combined basis of number of schools in the county and aggregate school attendance.

The powers and duties of the county superintendent fall broadly into two classes: first, educational, such as visiting the schools, advising, directing, examining and certificating teachers, holding teachers' institutes, enforcing the compulsory attendance law and deciding controversies arising under the school law; and non- or quasi-educational, such as the apportionment of state and county school funds among the townships or districts, giving notice of school elections, and the investigation and determination of all matters pertaining to changes in the boundaries of school districts. The latter class of functions were originally the more prominent, but the tendency at present is to place greater emphasis upon his more strictly educational duties. Not all of the powers and duties enumerated are exercised by the county superintendent in every state, and frequently some of these functions are exercised only in coöperation with other authorities, state or local. Where the county is adopted as the unit of organization for public school adminstration, the county superintendent naturally has greater authority than in those states operating under the township or district system.

A principle which is now well recognized is that free public education is a matter of such vital importance to the general welfare and interests of the state as a whole that it cannot be safely left to the mere voluntary action of the localities, but the state itself must see to it that the children of the state receive a good common school education, either by direct action or through supervision by the state of the educational agencies and facilities supplied by the localities. In regard to these two methods of dealing with the subject, the state has in the main adopted the former method, or direct action, for the carrying on of higher and professional education, while leaving to the localities the direct management of elementary and secondary schools. Although this separation seems necessary on account of administrative and historical reasons, nevertheless the well-being of higher education cannot be disassociated from the

management of elementary schools. The connection between higher and lower education is such that any widespread inefficiency in the lower grades will affect adversely the carrying on of higher education in state institutions, and disseminate an injurious influence throughout the whole system. Both, therefore, from the standpoint of the interest which the state has in the carrying on of higher education, as well as from that of its direct interest in the efficient management of elementary education, the state cannot safely allow the lower grades of education to be managed by the localities without higher administrative supervision. To effect this purpose county supervision alone is not sufficient, and the state has therefore established a central administrative authority or agency, with supervisory power sufficient to regulate and control the school system of the entire state.

The central educational authorities or agencies established by the state are a state board of education and a state superintendent of public instruction. A state board of education or similar body is found in about forty states. With respect to their composition, state boards of education may be divided into *ex officio* and appointive boards. The *ex officio* members of such boards are either primarily political officers, such as the governor, secretary of state, and attorney-general, or primarily educational officers, such as the superintendent of public instruction and the president of the state university or other state educational institution. The former class of *ex officio* members represents the older type of state board of education. Such members, particularly if in the majority, are likely to lower the efficiency of the board because of their lack of knowledge of educational problems, their preoccupation with other duties, and the lack of continuity in the policy of the board entailed by the coincident retirement of such members at the end of their terms of political office. Such *ex officio* political boards were deemed proper and sufficient at a time when the principal function of such boards was the manage-

ment of school funds and lands, but they are now found in comparatively few states.

Boards composed of *ex officio* educational officers are now found in a number of states. The Indiana board is composed almost entirely of this class of members. The Illinois Educational Commission proposed, in 1908, the creation of a state board of education, consisting of the state superintendent as *ex officio* chairman, and representatives of each of the following school interests, to be selected by the governor, with the approval of the senate: The University of Illinois, the State Normal Schools, the non-state colleges and universities, the city superintendency, the county superintendency, the public high schools, the non-state high schools, the state elementary schools, the non-state elementary schools, and two eminent citizens of the state not directly engaged in educational work. They were to serve for an eight-year term and receive no compensation except for expenses. The composition of the proposed board has many merits, though it might be criticized on the ground that a board of eleven members in addition to the state superintendent is apt to be unwieldy, and that there is too great a preponderance of educators on the board. It would probably be better to reduce the size of the board by eliminating the representatives of the non-state high schools and elementary schools, thus increasing the relative weight of the non-educators on the board. In California, where no salaried educational officer is eligible to membership on the board, the tendency towards the other extreme of purely lay control is apparently carried too far.

The second class of boards, with respect to their composition, are the appointive boards. In only one state, Michigan, is the board chosen by popular vote, and this board has comparatively small powers. In order to secure a non-partisan board, popular election should be avoided. In four states, New York, Connecticut, Rhode Island, and Virginia, the board is appointed by the legislature, while in the other states having

appointive boards, this function is performed by the governor.

In some states there are composite boards, having both *ex officio* and appointive members. There are twenty-two states in which the governor appoints some or all the members of the boards. With a view to preventing undue political control of the boards, the terms of appointive members are generally made longer than that of the governor, and provision is made whereby they may expire in rotation.

With respect to their powers and duties, the various state boards of education may be classified as follows: those which have supervision only over the common-school system proper, those which have supervision only over special or advanced institutions, such as normal schools and agricultural colleges, and those which have supervision over both the common-school system and the advanced or special institutions. In addition, there are, in many states, managing boards of trustees placed over a single state educational institution, and state boards entrusted with some special function relating to the state educational system, such as state examining boards and textbook commissions. Of the state boards of education proper, the most influential, as a rule, are those which have supervision over both the elementary schools and higher educational institutions, as in New York, Oklahoma and Vermont. The New York board, known as the Regents of the University of the State of New York, is the oldest in the country, having been created in 1784. It is composed of twelve members, one of whom is elected annually by the legislature for twelve-year terms. To this board are entrusted large powers of management and supervision of all the public schools and the entire educational work of the state.

A state board of education with large powers, such as that of New York, tends to add dignity and strength to the management of the school affairs of the state. The work of a state department of education may be broadly divided into financial or business, and educational or professional functions. Of

these two classes of functions, the former are more suitable for exercise by a board, especially if composed, at least in part, of lay members. A board is better qualified to exercise general supervision over the strictly educational activities of the state, rather than direct choice and control. A state board's most important function of an educational character should be the selection of the administrative expert to be placed at the head of the educational system of the state, but, unfortunately, in only a few of the more advanced states, such as New York, Massachusetts and Connecticut, does it actually possess this power. Whatever the method of selecting the executive head of the school system, there are many problems which come before him which he could be assisted in solving through the advice and counsel of the state board. The executive head may be assisted in carrying out an advanced and enlightened, but unpopular, policy through the moral support of the board. The board should act as a unifying and coördinating agency for all educational authorities. It should not undertake the active supervision of the public school system or the direct management of the state educational institutions. It should rather form an advisory council for considering the broad questions of educational policy, and the interrelations between the different educational agencies in the state.

An executive or administrative head of the state school system is found in all of the states. Formerly, he was frequently known as the commissioner of free or common schools, but in thirty-one states he is now known as the superintendent of public instruction, which title indicates the broadening conception of the scope of his functions. In eight states he bears the title of superintendent or commissioner of education, which represents a still more advanced conception of the office. In Connecticut he is called simply the secretary of the state board of education. This office arose during the first half of the nineteenth century, a state superintendent of common schools having been provided for in New York as early as 1812. In a

number of states, such as Illinois, Louisiana, and Vermont, the work of the chief state school officer was originally considered to be of such small importance that it could be satisfactorily performed by one of the existing state officers, such as the secretary of state. In such states this officer was consequently designated *ex officio* superintendent of public instruction. As the duties of the office increased, however, the secretary of state found it necessary to delegate the work to a subordinate or special deputy, and finally a separate state school officer was created.

The methods adopted for the selection of the state superintendent are popular election in thirty-three states, appointment by the governor in ten states and appointment by the state board of education in the remaining five. It was natural, both on account of the origin of the office and also on account of the general tendencies of the times, that popular election should have been adopted in the majority of the states. Several weighty objections, however, may be urged against this method of selection. The state superintendent should be an educational expert, but it is very doubtful whether popular election is the method best calculated to secure this result. This question is naturally involved in the broader question of introducing a short ballot for the state by making all or nearly all of the chief executive officers or heads of departments appointive instead of elective. If the selection were really made by the people as a whole, it probably would not as a rule secure experts, but it would have the compensating advantage of stimulating public interest in educational matters. But, in reality, selection by popular vote does not insure a choice by the whole people, but merely by the person or comparatively small group of persons who select the minor candidates of the party which turns out to have the plurality of votes in the election. The method of popular election of the state superintendent thus tends to lengthen the state ballot where it should be shortened, and contains a possibility, at least, of injecting political con-

siderations where they should not be allowed to enter. The provision of the Illinois Constitution that the state superintendent should be elected midway between general elections for other state officers indicated a recognition on the part of the framers of that instrument of the desirability of keeping him as far as possible out of politics, and was an effort on their part to effect that object. To some extent it has undoubtedly done so; yet, under present conditions, it is impossible for the best man for the position in respect to ability, experience and attainments to secure the position if he happens to belong to the opposite political party to that in power. It is, of course, true that such a man would not always be secured even by the method of appointment by the governor, but it is probable that he would be more often secured by this method.

Appointment by the governor or by the state board of education would have the advantage of making it possible to bring to the position a man from outside the state, if a better man could be secured in this way. Residence in the state is, of course, a qualification of value which ought to be considered, because, other things being equal, a resident is more familiar with the conditions with which he will have to deal. But there may be other qualifications, such as executive ability and professional attainments, which are of more importance and which outweigh the disadvantage of non-residence. Under the system of popular election, even though residence is not prescribed as a legal qualification, a non-resident, no matter what his attainments, would seldom if ever stand any chance of securing the position. Yet, it would certainly seem that there should be no tariff wall around the state to prevent the importation of professional ability in the management of schools. Cities have frequently resorted to the practice of securing men from the outside to place at the head of their school system, and, as a result, some of the best educators in the country are now occupying positions as city superintendents of schools in cities to which they came from elsewhere. The same plan is

frequently followed by boards of trustees of universities in selecting a president for the institution and by business concerns in selecting managers. It would seem that similar advantages would result from the adoption of a similar practice by the states.

Whether the state superintendent is elective or appointive, it would seem both desirable and feasible to prescribe for him certain qualifications of a professional character. In many states which have made no such provision, qualifications of a professional character are, as a matter of fact, observed in practice, but there seem to be advantages in expressly confirming this principle by legislative enactment, and half a dozen or more states have done so. The qualifications so prescribed may be classified as definite and indefinite. The latter class is illustrated by the requirement in Tennessee that the superintendent must be a "person of literary and scientific attainments." The purpose of such a provision, on account of its indefinite character, is liable to be defeated. The better provisions would seem to be those of a definite character, such as are found in Wisconsin and Montana. In Wisconsin it is declared that "no person shall be eligible to the office of state superintendent of public instruction who shall not have taught or supervised teaching in the state of Wisconsin, for a period of not less than five years, and who shall not hold the highest grade of certificate which the state superintendent is by law empowered to issue." In Montana it is provided that the superintendent of public instruction "shall have attained the age of 30 years and shall have resided within the state two years next preceding his election, and be the holder of a state certificate of the highest grade, issued in some state, or a graduate of some reputable university, college or normal school." The principle of requiring professional qualifications is more important than the exact details of the requirements.

The prevalent practice of electing the state superintendent by popular vote has an unfortunate influence upon his term, com-

pensation, and relation to the state board of education. By analogy with the practice in the case of other state political officers, he is ordinarily elected for a definite term of office. For popularly elected superintendents, this term is invariably either two or four years. The principle of rotation in office, formerly thought desirable in the case of political offices, is specifically provided for in one state, Alabama, where the superintendent is ineligible to succeed himself.[3] Even in states where no such legal provision is found, rotation of elected superintendents is often followed in practice through the periodical overturn of political parties. The superintendent's term may thus be brought to an end without any regard whatever to the fact that he has filled the office with signal ability, while, on the other hand, if his party happens to be returned to power, he may continue in office even though his record has been poor. In either case the short term of office and the uncertainty of reëlection discourage the formation of a continuous educational policy or of farseeing plans for the betterment of the school system of the state. In some of the states where the superintendent is appointive, a realization of these facts has brought about a modification of the short, definite term of office. Thus, in New Jersey and Massachusetts his term is five years, while in New York and New Hampshire he serves for an indefinite term.

The salary of the state superintendent is in every case a definite amount, fixed by law, varying from $1,800 in South Dakota to $10,000 in New York and New Jersey. Where the salary is thus fixed before the officer is selected, it is difficult to adjust the amount to the professional abilities and qualifications of the incumbent. The tradition of definite salaries for elective officers is so well established that it would scarcely be practicable to make a change, but, in the case of appointive superintendents, it would be better for the law to provide merely the maximum and minimum salary limits, the

[3] Constitution of Alabama, Sect. 116.

exact amount within such limits to be fixed by the appointing authority.

As already pointed out, in states having a state board of education, the state superintendent should be appointed by the board and should act as the executive officer of the board. The independent tenure of the superintendent produced by the practice of electing him by popular vote may render difficult of attainment that degree of close coöperation between the board and the superintendent which is desirable. The superintendent should not, of course, be so dependent upon the board that he has no will or initiative of his own. While he should be subject to removal by the board for cause, this should not be possible except at the end of annual periods and then only by more than a bare majority of the total membership of the board.

The state superintendent should have the privilege of selecting his own assistant superintendents and expert staff, subject to the approval of the state board. The organization of the superintendent's office should bear a rather close relation to the number and extent of the functions to be performed. The work should be divided according to some logical scheme of classification, and each division of work placed in a separate bureau with one assistant superintendent assigned to each department or to a group of related bureaus according as the amount of work may demand or the number of available officials may allow. Care should be taken to keep separate, as far as practicable, the work of the office which is of a strictly educational nature from that which is more of a business character. In some states there are a number of officials in the central educational department whose functions have become definitely and expressly specialized. Thus, in California, there is a commissioner of secondary schools, a commissioner of elementary schools and a commissioner of industrial and vocational education. In New York, a large part of the work is divided into the following divisions, at the head of each of which is a chief:

history, law, public records, science, vocational schools, examinations, administration, attendance, inspections, educational extension, school libraries, visual instruction and statistics. There are also the director of the state library, the secretary of the teachers' retirement fund board, and the specialists in agriculture and in vocational education for girls, besides numerous inspectors. In many other states, however, very slight tendencies toward specialization of function can be discerned.

There is not only a need for the careful organization of the office of the central department of education, but also for a field force to serve as antennae to keep the central office informed as to educational conditions and developments in all parts of the state. This object may, in general, be attained in either or both of two ways: first, by assigning to some officer of the central department supervision in all parts of the state over some special phase of educational activity, such as the enforcement of the school attendance law; or, secondly, by dividing the state into districts and stationing in each district a representative of the central department with supervisory powers of a general educational character. The first method embodies specialization as to a particular educational process; the second, specialization as to a particular geographical section of the state. It cannot be said that, with respect to most of the states, either of these methods has as yet been developed to any great extent. The utilization of local school officers, such as county superintendents, in carrying out the second method specified is scarcely feasible in most states, on account of the general lack of central control over such officers and their consequent inefficiency in performing their duties. Such inefficiency of local supervision has at times been largely responsible for the creation of state central officers with special educational functions, such as the state inspectors of rural schools in Minnesota, Illinois and other states.

The functions of the state superintendent vary in different states, but, in general, they may be classified into (a) super-

visory, (b) advisory and judicial, and (c) administrative and financial. In the first class would fall his powers to visit the schools, to require reports from county superintendents and other local officers, to collect school statistics, and to make rules and regulations for carrying into effect the provisions of the school law. In the second class is included his power to advise local school officers as to educational matters and also as to the interpretation of the school law. In many states he has judicial power to decide appeals brought to him from the action of local school officers and boards. An appeal may usually be taken from the decision of the superintendent to the judicial courts, but in New York the decision of the state commissioner of education in school controversies is final and conclusive.[4] Among the administrative and financial powers of the superintendent are those of examining teachers, granting and revoking certificates, recommending, or, in some states, prescribing textbooks and courses of study, and serving as *ex officio* member of the boards of trustees of various state educational institutions. In a number of states, he appoints conductors of teachers' institutes, in one or two states he appoints certain local school officers, in West Virginia he appoints the state board of education, and in Ohio the state board of examiners. He is frequently authorized to distribute state funds to the localities, and, in some states, may withhold such funds from localities which fail to comply with certain laws, rules or regulations issued by state authority.

The actual influence exerted by the state superintendent may be more or less than an enumeration of his legal powers would indicate, depending largely upon the energy and ability with which he discharges his duties. He should be, both from

[4] In New York it has been held that the remedy of a teacher removed by a city board of education for alleged neglect of duty is not by mandamus but by appeal to the state commissioner of education. People *ex rel.* Peixotto *vs.* Board of Education, 145 N. Y. Sup., 853. Cf. the similar Maryland case, Board of School Commissioners of Caroline *vs.* Morris, 91 Atl., 718.

the standpoint of legal power and from that of professional attainments, one of the principal educational leaders of the state. While there have been and are many notable exceptions, it is still too frequently true that the superintendent exerts no great influence upon the educational system of the state, but occupies rather the position of a clerical or statistical officer, with merely advisory powers. There would seem to be a need in many states for an increase of his powers and a strengthening of the powers which he already possesses. The following passage, though written with special reference to conditions in Illinois, is almost equally applicable to many other states:

"If the efficiency of the school system is to be increased, one of the most essential means to that end is an increase in the power of control vested in the central department of education. If the desideratum laid down in the Constitution that the children of the state shall receive a good common school education is to be realized and if the duty laid upon the General Assembly by the Constitution that there shall be provided a thorough and efficient system of free schools is to be performed, then the local autonomy and freedom from control of the local school officials in managing schools must not be allowed to extend to such a degree as to defeat the will of the state as thus solemnly expressed in its organic law. At the present time the state superintendent has neither direct nor express supervisory power over many important educational processes and matters connected with the operation of the schools, and such matters are therefore left to the practically unregulated control of local school officials. Among such matters may be mentioned the arrangement and sanitation of school buildings, the fixation of teachers' salaries, the enforcement of the attendance of school children, the selection of textbooks and determination of the course of study, and the appointment of the conductors of teachers' institutes. There are other needed processes, such as the medical inspection of

school children, which are scarcely done at all, because of the inertia of the localities and the lack of power of the central authorities.

"That some improvement can be brought about in the conduct of such matters by the localities by means of recommendations, advice, publicity and the dissemination of information cannot be denied, and much has undoubtedly been accomplished in Illinois in this direction. Where local officials are well intentioned but ignorant, the dissemination of information as to improved methods has often proved effective in bringing about improved conditions. It results, therefore, that, as regards some of these matters, as, for example, the imposition of a state course of study, the investment of the state superintendent with actual power of legal control would merely have the effect of enabling him to confirm conditions that already exist over most parts of the state. As regards other conditions, however, which cry out for remedy, the state superintendent is reduced to the impotence of vainly issuing circulars and letters to local school officials, in which he humbly begs to call their attention to the vital need of safeguarding the health of school children by the improved sanitation of school buildings or the installation of improved kinds of desks and other furniture. If the admonitions of the state superintendent are not observed, he can do nothing further. The question may well be raised whether the taxpayers have not the right to protest against the spending by the state of large sums of money on public education, unless the state goes further and sees to it that the proceeds of the taxes are expended in the most efficient manner possible under the circumstances, so that the educational facilities extended to each school child shall be the best and most improved that can be supplied under present conditions. It would not, of course, be feasible or desirable, with regard to most matters, for direct management of educational processes to be taken out of the hands of the local officials and centralized in the state department. But a greater amount of

central supervision and control over many such processes seems both feasible and desirable. At present the state superintendent is empowered to enforce his control over some matters by withholding certain funds from recalcitrant local officials. This method of enforcement is open to objection, however, on the ground that, if exercised, it would have the effect, in many cases, of bringing hardships upon those who are in no way to blame for the delinquencies of the school officials, namely the teachers and school children, whose interest it should be the primary aim to preserve and promote. A less objectionable and more effective means of enabling the state superintendent to enforce his rules, regulations and decisions would be to vest him with the power to suspend or even to remove such local officials as may disobey such rules and decisions or be guilty of flagrant neglect of their official duties. Nevertheless, however desirable theoretically such a method of enforcement may be, it is doubtful whether centralized control to such an extent would be tolerated in the present state of public opinion in Illinois.

"Until public opinion shall become educated up to a greater realization of the desirability of central control, it is probable that the state superintendent will have to continue to depend, for effecting improvement in many matters, upon recommendations, publicity and widespread dissemination of information."[5] Improvement in the management of the local schools and a greater degree of central control could probably be brought about by a closer relation and more effective coöperation between the state superintendent and the county superintendents, and also by greater contact and association of the county superintendents with each other. The supervision of the county superintendent over the schools in his county will tend to become more efficient if he is given or required to take more opportunities of coming in contact with, and imbibing ideas

[5] *Report of the Efficiency and Economy Committee of Illinois,* pp. 414-415.

from, others occupying similar positions and from the state superintendent. In North Carolina an annual conference between the state superintendent and the county superintendents is held, which every county superintendent is required by law to attend unless providentially hindered, his expenses being paid out of the county school fund. The state is divided into five districts of twenty counties each, and there is also an annual conference in each district attended by the state superintendent and the county superintendents of that district. Each county superintendent, then, has the opportunity of attending a conference with the state superintendent at least twice a year. Local autonomy in school matters is still the prevailing condition, and, under proper restrictions, is desirable in order to strengthen the interest of the people in their schools. But when carried too far, the evils of local control outweigh any possible advantages. Such undue local control cannot be effectively overcome through the creation of the usual formal legal interrelations between the state superintendent and the county superintendents, such as the transmission of statistical information and the taking of appeals in cases involving the interpretation of the school laws. Effective state control is more easily exercised where there exists an administrative relation between the state superintendent and the county superintendents. Some tendencies in this direction are noticeable in some states. Thus, in New York, Virginia, and Nevada, where the jurisdiction of the officer corresponding to the county superintendent is not coëxtensive with the county, we have the opening wedge toward central control, because local control is not so likely to be exercised over an officer of a district not generally used for other local governmental purposes. The most advanced state, however, in respect to central control over the county superintendent is New Jersey, where the county superintendent is appointed by the state commissioner of education, with the advice and consent of the state board of education. He may be a resident of any part of the state, and his

uniform salary of $3,000 is paid by the state. The county superintendent in this state is therefore in reality what has been called an "allocated state inspector." [6]

An important means of extending and strengthening state control over the local management of the school system is through the policy of state financial aid. This method of state control has developed hand in hand with the establishment of state central educational authorities. The policy of granting state aid to localities for educational purposes carries with it the implication that the exercise of educational functions by such localities is more than a matter of mere local concern. It also implies that the state should follow the funds thus granted to see that they are properly and efficiently expended, and this means the entering wedge of state control. In most states the support of the public schools still comes largely from local taxes, but the proportion of the total expenditure contributed by the states is steadily increasing. In Massachusetts it has even been proposed that the public schools be supported entirely by state funds. State financial aid may be in the form of income from a permanent fund or endowment or may be appropriated out of the proceeds of current taxes. It may be distributed regularly among the localities on a specified basis of apportionment, or it may be granted on condition of the adoption and maintenance of certain specified educational standards. The first method aims to equalize conditions among the localities and to assist them in performing necessary educational activities; the second undertakes to supply a definite incentive to stimulate the localities to supply still better educational facilities, somewhat along the line of the English "payment-by-results" plan of distributing funds to the localities.

There is a considerable variation in the bases of apportioning school funds adopted in different states. Among the bases adopted are the assessed valuation of property, amount of

[6] O. J. Morelock, in *Proceedings of the National Education Association*, 1914, p. 260.

taxes paid, total population, school-age population, school enrollment, school attendance, number of schools, number of teachers employed, local expenditures for schools, and various combinations. The basis of school-age population is that most frequently found, but is objectionable in that it neither equalizes conditions nor stimulates effort. These objects might be better attained by a combination of actual school attendance with the number of teachers employed. State apportionments to counties may in turn be redistributed to school districts, but not necessarily on the same basis as the original state apportionment. State funds may be withheld from particular localities which fail to comply with the conditions laid down by the state, such as the maintenance of schools for a given minimum period during the year, the employment of properly qualified teachers and the payment to them of minimum salaries, and the prompt transmission of accurate school statistics to the central authorities. School authorities in the more advanced parts of the state, particularly in the cities, may voluntarily keep their schools at a standard far beyond the minimum requirement set by the state, but in the case of the rural and more backward communities, the possibility of losing their share of the state funds may be more effective than compulsory legislation in keeping them up to the state standard. The withholding of funds, however, is a power which is seldom found necessary to exercise.

A corollary which naturally flows from the policy of the states in establishing free public schools is the enactment by the states of compulsory attendance laws. Since it costs little more to maintain schools with full attendance than with poor attendance, economy of expense per unit of educational result is enhanced in proportion to the degree of attendance. Compulsory education has in the past met with much opposition in certain quarters where it has been denounced as un-American and an undue interference by the state with individual liberty. This is merely one of many instances, however, where social

necessity must override individual rights where the exercise of such rights may be detrimental to the best interests of the state. The principle of compulsory education was declared by Massachusetts and Connecticut in the early colonial era, but the first modern state law on the subject was enacted by Massachusetts in 1852. The movement has since spread until, at the present time, such laws are found in all but one or two states. These laws vary considerably in the ages of required attendance, the annual term of required attendance, the exceptions allowed under the rules, and the methods of enforcement. In most instances the states have been content with a legislative declaration in favor of compulsory education, without making adequate administrative provision for the enforcement of the laws. Although the laws are being continually amended and strengthened they are still weak in most states. In only one state, Connecticut, is adequate provision made for enforcement by agents of the state department of education. In other states the duty of enforcement devolves upon local officers, either truant officers especially charged with this function or the ordinary police force, sheriffs, and constables. Central supervision over the enforcement of the law by such local officers, however, is provided in some states as in Indiana, through the state board of truancy, and in New York, through the chief of the division of compulsory attendance in the state education department. Some influence may also be exerted through the possibility of withholding state funds from districts where the law is not properly enforced. In spite of the compulsory attendance laws, however, there were, according to the United States Census of 1910, only eight states in which the percentage of children between six and fourteen years of age attending school was ninety or above.[7] If compulsory attendance laws are generally and effectively enforced for one or two generations, the realization of the advantages of educa-

[7] These states were Connecticut, Iowa, Massachusetts, Michigan, Nebraska, New Hampshire, New York, and Vermont.

tion may become so generally diffused that the laws themselves may largely cease to be necessary.

One difficulty to be overcome in connection with the administration of compulsory attendance laws is that of securing an harmonious enforcement of child labor laws. To obviate this difficulty as far as possible, there should be close coöperation between the state department of labor or factory inspection and state or local officers charged with the enforcement of compulsory attendance laws. Another difficulty to be overcome in attaining an effective enforcement by the state of compulsory attendance laws is the opposition of private schools to state inspection. Children attending private or parochial schools are regularly exempted from the operation of the state law. But unless the state authorities are informed as to what children are attending private schools, they cannot determine the degree of effectiveness with which the compulsory attendance law is being enforced. Furthermore, the general interest of the state in the education of its children would warrant some degree of governmental supervision over the work of private schools. A slight tendency in this direction is noticeable in some states. Thus, in Connecticut, private schools are required to keep a register of attendance, open to inspection, and to make reports to the state board of education. In a number of states, children attending private schools are exempt from the operation of the compulsory attendance law only if such schools are in session as long as the public schools and give substantially equivalent instruction. In regard to private institutions of higher education, grants of state aid are frequently made, but little administrative supervision is exercised over them by the states. In New York, however, they are subject to inspection by the state department of education, from which they receive their charters of incorporation and power to grant degrees.

From the policy of compulsory education, several corollaries follow. In the first place, if minors between certain ages are to be compelled by the state to attend school, then it is the

business of the state to see that the instruction provided in the schools is suited to their needs. This consideration would warrant the introduction of manual training, and of industrial and vocational training for certain classes of pupils. The second corollary to be derived from the policy of compulsory education is that the school building and its surroundings should be sanitary and attractive. The state has no moral right to compel pupils to attend schools where the conditions and environment are unwholesome and detrimental to health, eyesight and physical, moral or, perhaps, even esthetic development. Many states undertake partially to prevent or remedy such conditions by vesting in state authorities power to recommend improved plans and specifications for school buildings, or to approve those adopted by local officers, and to inspect and condemn or correct buildings already erected. State-wide medical inspection of school children has also been provided for in some recent laws. The state authorities vested with such powers are either the educational or health authorities, or sometimes both. The Indiana state board of health has adopted an elaborate set of rules and regulations for the construction, heating, lighting, ventilation and sanitation of school buildings.[8] It has condemned a considerable number of school buildings which failed to meet the requirements laid down. In Wisconsin, the state department of education, upon complaint of the unsanitary or unsafe condition of any local school building, may inspect such building by its own agents and order its repair or condemnation. Failure on the part of the local school authorities to comply with the order of the state department may result in the forfeiture of their share of the proceeds of the state tax for school purposes. In a number of other states, however, the laws which purport to provide for state supervision of the construction and sanitation of school buildings are rendered weak and ineffective through failure of the legislature to make appro-

[8] These rules and regulations have been held to have the force and effect of law. Blue *vs.* Beach *et al.*, 155 Ind., 121.

priations to pay the expense of necessary state inspections or to provide adequate penalties for failure on the part of the local authorities to comply with the orders of the state department.

Another corollary which may be derived from the policy of compulsory education is the practice of supplying free textbooks, particularly to the children of indigent parents. In fifteen states textbooks are supplied without charge, at least in the elementary schools, and in a number of other states this plan is permitted by law. In such states contracts with the publishers are usually made by a state board for supplying the books required, but two states, California and Kansas, have undertaken the publication of their own textbooks. Provisions are found in most of the states for a certain degree of uniformity in the textbooks used over a certain area, and prohibiting the changing of books during a minimum period of time. The area of uniformity is either the district, township, county, or the state itself. One-half of the states have now adopted compulsory state uniformity. In others, however, state uniformity may in practice be approximately reached through recommendations of the state educational authorities. In order to make allowance for legitimate differences in local conditions and needs, and at the same time retain a considerable degree of central control, some states provide that local school authorities shall select books from lists approved by a state officer or commission. State uniformity implies adoption and selection of the books by some state central authority. This function is performed by the state board of education or by a state textbook commission created specially for this purpose. Closely connected with state uniformity of textbooks is the prescription of courses of study by state authority. In a number of states the central department of education is empowered to prescribe a course of study for elementary schools, while, in other states, the central department has prepared and recommended a course of study, which has been adopted by most or all the schools in the state.

A considerable degree of central control has also been extended over the examination and certification of teachers. A study of this subject made in 1911 showed that teachers' certificates, or licenses to teach, were issued in all states except Delaware by state authorities: either the state superintendent, the state board of education, or the state board of examiners. In most of these states, certain grades of certificates might also be issued by local authorities. "The tendency in the development of the administration of teachers' certificates has been and is toward centralization of authority in state agencies. Within the last six years at least eighteen states have passed legislation which produced this effect, and in two-thirds of these a new era was entered upon. As to the effect of centralizing the authority to certificate teachers in state agencies, there seems to be a general agreement that much good has come from it. Higher standards in the examination of teachers have generally prevailed, and the profession has been advanced through the wider validity of certificates."[9] In thirty-eight states, the central educational authorities also had the power of suspending or revoking some or all grades of certificates. The power to prepare the examination questions and to grade the papers has also been largely centralized in the hands of state authorities. The actual conduct of the examinations is still frequently entrusted to county superintendents or other local officers, but, in 1911, there were only seven states in which the county officers were free from any interference by state educational officers in the examination of teachers.[10] In order that the services of more competent teachers may be secured, a number of states have also enacted minimum salary laws and pension systems for teachers. Furthermore, a few states, such as Minnesota, have established official employment agencies for

[9] Harlan Updegraff, "Teachers' Certificates Issued under General State Laws and Regulations," *Bulletin of the U. S. Bureau of Education,* 1911, No. 18, p. 141.

[10] *Ibid.,* p. 143.

placing teachers, such agencies being organized as bureaus in the state departments of education of the states which have established them.

In order that an efficient system of public schools may be maintained, it is desirable not only that provision be made for establishing schools and employing teachers, but also for holding teachers' institutes and establishing training schools where teachers or would-be teachers may become proficient in the performance of their professional duties. Teachers' institutes are frequently held under the auspices of the counties, but in many states they are more or less under the control of state authorities. Such state control is brought about by state appropriation for the expenses of the institutes, and by the prescription of the program of study and the appointment of the conductors and instructors by state educational authorities. With the growth of normal schools and summer schools, however, teachers' institutes have become less important.

In practically all the states, one or more state normal schools are maintained, and the graduates of these institutions are usually allowed to teach in the public schools without further examination. In some states having more than one normal school, such as Illinois, each school is under the management and control of a separate board of trustees. It may be questioned, however, whether the separate board system is the best possible arrangement. There seems to be no good reason for the existence of separate boards when one board would serve the purpose with increased efficiency and a less expenditure of effort. Other things being equal, a single board of control charged with the responsibility of governing all these schools would do so in an abler manner, and more economically and efficiently than separate boards. A single board of control would not destroy the individuality of the schools, nor extinguish any healthy rivalry which now exists among them; for such individuality and rivalry are largely created by the presidents and faculties of the different schools, who would still, for

the most part at least, remain separate. A single board would, indeed, be able to develop more effectively some specialization in the work of the different schools, and it would tend to unify and systematize those parts of the management and administration of the schools, such as the purchase of supplies, where uniform methods or single control are effective. A single board would also make possible the adoption of standard credit units, which would facilitate transfers of students from one school to another.

Single boards of control over all the normal schools in the state have been established in a number of states, including Massachusetts, New Jersey, Maryland, Michigan, Minnesota, Kansas, Colorado, California and others. In most cases these boards also have some jurisdiction over other educational institutions and the state system of elementary and secondary schools as well.

Not content with the establishment of elementary and secondary schools and of schools for training teachers to teach in them, many states have established higher institutions of learning, such as state universities and agricultural and mechanical colleges. These institutions, found mostly in the Central and Western States, have, through the munificent support given to them by their respective states, begun to rank side by side with the older privately endowed institutions of the East. In the large majority of cases the managing boards of trustees of state universities are appointed by the governor with the consent of the senate, but in a few, including Illinois and Michigan, they are elected by popular vote. In most cases there are a few *ex officio* members. In some states, the boards of trustees of the state universities have also other state educational institutions under their management and control. State universities have been and are a potent influence in building up the standard of education throughout the state. Specifically, they have promoted higher standards in secondary schools through their high school visitors or inspectors, and through placing

on their accredited lists only those schools which comply with certain minimum educational requirements.

"In establishing institutions for higher education many states have followed the policy of providing a number of institutions, distributed in different parts of the state, and each independent in its organization and management. Thus, apart from state normal schools, nine states maintain three or more state supported and state controlled educational institutions, and twelve states have two such institutions,—a state university and an agricultural and mechanical college. In seven states appropriations are made to privately endowed institutions. On the other hand, in seventeen states, the state university comprises all the higher educational work, except that done in the normal schools; and in nine states there is a state agricultural and mechanical college but no state university.

"It is the general agreement of wise and progressive leaders of education in the states at the present time that there is a distinct advantage in combining in one institution the colleges of liberal arts and sciences and all the professional schools, including colleges of engineering and agriculture, thus forming a single university for a given state. The distribution and subdivision of the work of higher education has led in most cases to waste, unnecessary duplication, undesirable competition for students and appropriations, insufficient financial support, confusion as to the standards which each institution should maintain, the preponderance of local opinion, and consequent inadequacy of educational requirements.

"The waste due to duplication of faculty, equipment and buildings, is, however, sometimes overestimated. There is no loss of economy or of efficiency in carrying on in different places the work of the first two years of a liberal arts course or of courses preliminary to technological work, provided that the faculty and equipment are fully utilized. It is when specialized and technological work is begun, when the services of high salaried men and enormously expensive equipment are

required that the waste and inefficiency of plant inevitably appears.

"The need for readjustment is very real; and recent changes in a number of states show the growing opinion that waste, overlapping and unwholesome competition should cease. In states where two or more institutions have been firmly established, the possibility of physical consolidation is often too remote for practical consideration. But in some states, as in Michigan and Indiana, the existing institutions have voluntarily worked out a basis of coöperation and division of labor; in others efforts at organized coöperation are under way; while in several states administrative consolidation of several institutions under a central board of control has been established." [11]

Such administrative consolidation has been effected, for example, in Kansas and North Dakota. The Kansas act abolishes the former boards of regents of the separate state institutions and creates a state board of adminstration, appointed by the governor and senate, to which is entrusted the general control and management of the state university, the agricultural college, and the state normal schools.[12] In 1915, North Dakota created a state board of regents, similarly appointed, which succeeds to all the powers and duties formerly exercised by the separate boards of trustees of the various state educational institutions. These and other similar central boards have been created in order, among other purposes, to stop lobbying by separate institutions for legislative appropriations, to promote economy and efficiency in the use of state money for higher education, and to unify and coördinate the educational activities of the state.

Another phase of educational activity in which the states engage is that of providing library facilities. Many states have established state libraries and have also undertaken to promote

[11] J. A. Fairlie, in *Report of the Efficiency and Economy Committee of Illinois*, p. 441.

[12] Kansas Session Laws, 1913, Ch. 287.

the spread of local libraries through the creation of state library extension commissions. Relatively little attention, however, has, in general, been paid to the development and organization of the state's library services, and in most states they are not well correlated. A few states, however, have adopted a more coördinated plan. The New York State Library has been the largest and most important state library in the United States; and the system of administration also illustrates the greatest degree of centralization. It is organized as a division of the Department of Education, under the general control of the board of regents. This board has charge of all books, pamphlets, records, archives, and other property appropriate to a general library. It appoints a library director, who has direct charge of the state library and superintends the state's library activities, including the legislative reference bureau, library extension work, and a library school.

In Indiana, the state board of education is the state library board, and selects the state librarian, who serves until his successor is elected. It thus appears that New York and Indiana have both organized their state libraries as a branch of the educational system. Massachusetts, Ohio, Texas, and California have provided appointive library boards. In these states the state library includes all or the most important library services; but in New York and California the law libraries, and in Indiana the legislative reference work, are under separate management. Most of the other states place the state library under the control of *ex officio* boards; but in many cases there are separate authorities for different phases of library work, such as law libraries, library extension, legislative reference bureaus, and archives.

An important matter is the question of the selection of a competent state librarian. It seems clear that the state librarian should not be an *ex officio* elective officer, who is chosen primarily for the performance of other duties, and who is only incidentally state librarian. Such an elective official is not

likely to be a person versed in library matters, and abreast of the most modern methods of library administration. The state librarian should be appointed, and should not have a definite term of office, unless it is understood that he will ordinarily be reappointed upon the expiration of such term. He should receive a salary sufficiently large to make it possible to secure the services of a well trained and experienced librarian. He should have power to appoint other librarians and employees engaged in library work. He should be empowered to purchase books, superintend the library extension work, and operation of traveling libraries, and to give advice and information with regard to the proper administration of the libraries located in various state charitable and correctional institutions. A single executive head over the library facilities of the state means economy of administration, unity of policy, and more efficient and comprehensive services. Such an arrangment tends to prevent danger of confusion resulting from overlapping of work, and conduces to the coördinate development of the various branches of library work.

Before concluding this chapter, a word should be said in regard to the influence of the National Government in education. Except in the case of military and naval training, the National Government does not undertake the direct management of educational activities within the states, but has nevertheless promoted the cause of education in a substantial way through land grants and appropriations, the value of which has amounted to hundreds of millions of dollars. Especially noteworthy is the Morrill Land Grant Act of 1862, which granted to each state 30,000 acres for each senator and representative in Congress for the endowment of agricultural and mechanical colleges. There are now about seventy of these land grant colleges. Furthermore, in 1867, there was established a bureau of education at Washington, now under the Department of the Interior, with a commissioner of education at its head. The bureau is authorized to collect and diffuse information on edu-

cational matters, and also to supervise the expenditures under the Morrill and supplementary acts. The United States Commissioners of Education have counted among their number some of the ablest educational leaders in the country, and their annual reports constitute the most authoritative and comprehensive sources of information to be found anywhere regarding educational conditions and progress in this country and abroad.

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CHAPTER XIII

ADMINISTRATION OF CHARITIES AND CORRECTIONS

A consideration of the administration of charities and correction naturally follows that of educational administration, with which it has points both of similarity and of contrast. Both systems of administration involve the participation of local units of government and the maintenance of state institutions. The distinction between educational institutions and those which are classed as charitable or correctional is not always sharply defined. Some institutions, such as those for the deaf, dumb and blind, may be classed as either charitable or educational or both. Educational processes of different kinds are carried on at many charitable and correctional institutions with the object of remaking as large a portion of the inmates as possible into normal members of society. The administration of charities and correction differs from that of education in that the permanent success of the former is measured by the extent to which it becomes constantly less necessary through the gradual elimination of the dependent, defective, and delinquent classes; while the natural and proper tendency of educational administration is in the direction of constant growth, of ever-widening scope and purpose.

Charitable and correctional administration differs from that of education in that, even at its most extended development, it can and should deal with only a limited class of society, while education is or should be practically universal. This difference has had an important influence upon these fields of administration. The universality of education tends to produce an almost universal interest in the methods and instrumentalities of edu-

cation, whereas a large portion of the public knows and cares little about charitable and correctional administration because it touches only a class instead of the entire citizenship. The consequence has been that greater difficulties and abuses have occurred in charitable and correctional administration, because it is less subject to the wholesome and salutary influence of public interest and public opinion.

At the beginning of the history of the older states, the public administration of charities and correction, in so far as it existed at all, was carried on entirely by the local units of government, the town and the county. In the case of correctional administration, town and county jails and lock-ups were provided. The administration of charities, however, consisted at first of out-door poor relief distributed by the town overseers. As communities grew and became more settled, pauperism increased and the earlier sporadic and temporary methods of out-door relief became insufficient. Before the establishment of public institutions, however, a method frequently adopted by the towns was that of "farming out" the poor, that is, contracting with some citizen of the neighborhood to care for them. Sometimes the privilege was auctioned off to the lowest bidder. As the purchasers of this privilege were usually actuated by mercenary motives rather than by any particular interest in the welfare of the inmates, many abuses naturally arose which led in time to the establishment of public almshouses in the localities. These institutions contained a mixed population of both sexes and all ages and conditions. There was practically no attempt to classify the inmates, much less to extend special treatment for the cure or improvement of particular classes of paupers. During the first part of the nineteenth century, the administration of public poor relief in some of the older states became centralized in the counties or a greater degree of supervision of the counties over the poor-relief activities of the towns was effected. The improvement of conditions through this development, however, was not very marked. There was

still little or no attempt at classification or differentiation of the inmates, and, in both charitable and correctional administration, the whole purpose seemed to be the segregation of the dependent or delinquent classes, with no thought of the cure or eradication of the mental, moral or physical diseases from which they suffered.

The abuses which manifested themselves under the system of local administration, whether in the township or county, constituted one of the principal causes which led in time to the extension of state supervision over local activities. This development was also assisted through the growth in some states of a class of unsettled or state paupers, that is, those who had not established a residence in any particular locality in the state, and therefore had no legal claim upon the local authorities for relief. Provision was made by the state for the relief of such persons, but such aid was not administered directly by state authorities. The amount of money deemed necessary for the purpose was furnished by the state to the local authorities, to be used by them in relieving state paupers. In order to safeguard the interests of the state, the expenditure of state funds by local authorities required some degree of state supervision over them. The extent of this supervision was at first practically negligible, but as it became more evident that the local authorities, unless effectively supervised, could not be depended upon to protect the state's interest, and as the financial interest of the state became greater through the increase in the number of state paupers or through the extension of state aid to other classes of dependents, the amount of state supervision tended steadily to increase.

With the growth of the general population and the increasing complexity of modern social conditions, there has been a steady growth in the size of the dependent and delinquent classes and a growing inadequacy of local or private agencies to deal with the problems to which the care of such classes gives rise. Local public agencies, in particular, have shown themselves, as a

rule, unprogressive and ignorant of the most advanced methods of dealing with the inmates entrusted to their care. The methods adopted in local charitable institutions have been evolved with the object in view of merely affording immediate relief, or, in the case of the insane and criminal classes, of merely segregating them from the balance of society. It became evident that, if the newer ideals of cure, reformation and prevention through the adoption of advanced methods scientifically adapted to the accomplishment of these objects, were to hold sway in charitable and correctional administration, state interference was necessary, either in the form of supervision of local and private agencies or through direct management and control. Furthermore, local and private agencies, except in the larger centers of population, were not financially able to maintain adequate and efficient institutions, even if competent in other ways to do so, and consequently they requested and received considerable grants of money from the state.

Although private charity, particularly in the form of outdoor relief, except in the case of great emergencies and catastrophes, has the advantage over public charity that it is more likely to retain the personal touch from which flows the true charitable spirit; nevertheless it is frequently so unintelligent that its ministrations tend to increase rather than to decrease the total amount of dependency. Such a tendency is best combated by a more general diffusion of information and education regarding the best methods of charitable relief, and the dissemination of such information is an important function of the state. Notwithstanding the great expansion of public agencies of charitable relief, much work of this sort is still performed by private institutions. Most of these are, in one sense, not purely private institutions, because they are chartered or incorporated by the state and receive state aid or exemption from taxation. It has sometimes been argued that when a charitable institution under private management does

not receive financial aid from the state, it should not be subject to state supervision. This individualistic doctrine has occasionally been upheld by the courts,[1] but is gradually giving way to the necessity for social control, in order to safeguard the interests of the inmates and of private philanthropists who may be induced to contribute to the support of such institutions. In the case of those private charities which regularly receive appropriations of state money, it is manifestly the duty of the state to see to it that such funds are wisely and economically expended. Unfortunately, such funds are frequently appropriated in lump sums to the various private institutions, in accordance with the extent of the political influence which the managers are able to bring to bear upon the legislature, rather than in proportion to the amount of service which it has been definitely determined by expert inspection can be furnished by the respective institutions. If the somewhat doubtful policy of granting state funds to private charities is to be continued, the latter method should be the only basis on which such funds are granted, but before such a basis can be adopted, it will be necessary, in order that the expert inspection be had, that state boards be vested with greater powers of supervision over private charities. Indeed, there would be some advantages in having funds appropriated in a lump sum to the state board, to be distributed by it among private charities. Some central supervision over private charities has already been brought about in a number of states. Thus, in Illinois, before private associations for the care of dependent and neglected children can be incorporated, they are subject to the examination and approval of the state board of administration. This board may also visit and inspect, upon complaint of two reputable citizens, any charitable association or institution appealing to the public for aid or which is supported by trust funds. In Massachusetts, private associations applying for incorpora-

[1] People *ex rel.* State Board of Charities *vs.* New York Society for Prevention of Cruelty to Children, 162 N. Y., 429.

tion as organizations for charitable purposes must be investigated by the state board of charities before a charter can be issued, and, after incorporation, they are required to report annually to the state board. Oklahoma has gone still further and provided that all private institutions for the support of the poor, whether or not in receipt of aid from the state or from local units of government, shall be subject to inspection by the state commissioner of charities and correction and must furnish reports and information to that officer whenever demanded. Such reports and information are essential if the state department is to be fully informed regarding the whole problem of charity and the extent of dependency in the state.[2]

The same considerations which require central supervision of private charities apply equally to local public charitable and correctional institutions. These institutions are usually found under the direct control of township trustees and overseers of the poor, county boards of commissioners and sheriffs. The conditions which developed in these institutions as the result of decentralized administration, due to ignorance and lack of proper care or interest on the part of the local authorities, were frequently revolting to every sense of decency. The county jail in particular, on account of its poor construction and its frequent lack of proper means of separating the sexes and the mature from immature prisoners, has been roundly denounced as a prolific breeding-place of vice and crime. The class of misdemeanants who are sent to the county jails are much more numerous than the felons in the state prisons, and, being composed to a considerable extent of young first offenders, they should be given every opportunity and inducement to reform. To entrust their detention to ignorant local authorities, however, results in sending many of them upon a career of crime, thus swelling the number of felons with which the state will

[2] On the subject of state supervision of private charities, see *Proceedings of the National Conference of Charities and Correction*, 1902, p. 130; 1911, p. 35.

ultimately have to deal. The inefficiency, not to say vicious character, of the local institutions thus exerts an injurious influence throughout the entire system of the state for dealing with criminals, and cannot be safely ignored by the state as if it were a matter of mere local concern.

Central supervision over local charitable and correctional institutions is desirable in order to secure better care and treatment of the inmates, better construction and arrangement of institutional buildings, and the more efficient collection and prompt transmittal of statistical reports. Experience has shown that these objects can seldom be attained under a decentralized system of charitable and correctional administration, and some degree of central supervision and control has therefore been introduced in most states. This first took the form of mere supervision, but where this was not found sufficient, some degree of control was added. Thus, in New York, Massachusetts and many other states the State Board of Charity and the State Prison Commission, or similar boards, are given powers of visitation and inspection of local charitable and correctional institutions respectively. The insufficiency of mere visitorial and recommendatory powers has led in some states to the granting of more mandatory powers to state authorities. Thus, in Alabama, all plans and specifications for local jails must be submitted for approval to the State Prison Inspector, who is empowered to enforce proper rules regarding sanitation and ventilation. A Minnesota law of 1893 gave to the State Board of Corrections and Charities of that state power, with the consent of the district judge, to condemn such county jails as were found unfit for use. Under an Indiana law of 1909, "when the Board of State Charities finds on inspection that a jail is unfit for the confinement of prisoners, it is required to report the facts to the judge of the circuit court. On the judge is conferred the power then to require that the jail be put in proper condition. If he does not act within a reasonable time, the governor is given authority to condemn the

jail and order the prisoners to be removed to another county until proper conditions are secured." [3] Through these more drastic provisions, the management of local institutions may to some extent be virtually transferred to central authority. This does not extend, however, to the appointment or removal of the local officers, except that county boards of charity or visitors are sometimes appointed by the governor or the state board. The condition of the local institutions has undoubtedly been greatly improved by the development of central supervision. In the case of some local institutions, however, such as county insane asylums, even state supervision does not secure the best results, and in some states, therefore, all insane patients are transferred to the direct care and management of the state in state institutions.[4]

Centralization in state charitable and correctional administration has taken the form, not merely of the supervision of the activities of local authorities and private agencies, but also of the establishment and direct management by state authorities of institutions for the care of particular classes of dependents, defectives, and delinquents. State prisons for the incarceration of felons were established in some of the older states about the beginning of the nineteenth century. The establishment of state charitable institutions followed a half century after the state prisons. The earlier development of direct state correctional administration was due in part to the feeling that hardened felons were a greater menace to the community than were the objects of public charity, and their effective segregation from society required greater security than could be found in the poorly constructed county jails. It was also due in part to the fact that the evils connected with the local administration of charities were to some

[3] *The Development of Public Charities and Correction in Indiana,* 1792-1910, p. 78.

[4] On state supervision of local jails and almshouses, see *Proceedings of National Conference of Charities and Correction,* 1910, pp. 303-307.

extent alleviated through private benevolent enterprise in establishing institutions for the care of special classes of dependents or defectives. In this way some degree of differentiation in the care and treatment of these classes was effected, and consequently the need for direct state interference in charitable administration was not so early or so keenly felt. It is noteworthy also that the first state charitable institutions to be established, namely, the state insane asylums, were not considered as purely charitable institutions, but were partly intended to protect society from the menace of the violent insane.

The various state charitable and correctional institutions have been established from time to time for the care of special classes of inmates as the result of a policy of opportunism, depending in part upon the extent of the dissatisfaction with local methods, in part upon the increase of scientific knowledge of better methods of care and treatment with regard both to the older classes of inmates and also the newer classes not formerly under public care, such as the feebleminded, epileptics and the victims of tuberculosis, and in part upon the willingness of the legislature to provide the necessary funds. As at first developed, these institutions were state institutions in the sense that they were supported almost, if not entirely, by funds from the state treasury, were each managed directly by a separate board of trustees appointed by the governor and senate, and usually also received inmates from any part of the state. So far as the control over the institution was concerned, however, the state character of the institution was frequently merely nominal, for local influences were predominant in its management. This condition was the result of several causes. In the first place, the site upon which the institution was located, and sometimes also buildings and money, were frequently donated by residents of the locality in question. It is doubtless true that this circumstance stimulated local pride in the institution, and that, without such

local aid, the institution probably would not have been established until the problem, in the solution of which it was designed to assist, had become much more acute. Nevertheless, the ultimate effect of the policy of the state in establishing institutions in particular locations in consideration of donations of land and money by local residents is often injurious to the welfare of the institution. It may, as a result, be placed in a disadvantageous location which will prevent it from accomplishing the best results. But a still more injurious effect of this policy is the tendency which it produces on the part of the local residents to regard the institution as a local asset for which they have paid a *quid pro quo* and from which they have a right to secure as large a return as possible.

In the second place, a circumstance which tends in the same direction is the practice of appointing one or more members of the board of trustees from the residents of the municipality or county in which the institution is located. In favor of this practice it may be argued that local trustees are more familiar with local conditions than those residing at a distance, and can give more of their time and attention in promoting the welfare of the institution. Experience has shown, however, that the net result of this practice is not apt to be favorable to the institution's best interests. Such local trustees are apt to look upon the institution as a local enterprise for local benefit, particularly if they have local business interests. Nepotism is more likely to creep into the institution. A much larger proportion of the supplies for the institution is apt to be purchased from local merchants at excessive prices, with the resulting lack of economy and chances for favoritism. Finally, the administration of the institutions under separate boards tends to become localized because such boards are not under the effective supervision of any state officer or body of general powers and responsibilities. The governor's powers are usually quite limited and those which he has are not always effectively utilized, and no

state organ or agency is at first specifically created to perform this function of supervision. The results have been a lack of uniformity of methods among the various institutions in regard to matters in which uniformity would be distinctly desirable, a lack of efficiency and economy in the general management of the institution, and sometimes such an amount of demoralization among the officers and employees as to result in gross abuses, which the board of trustees are either ignorant of or are unwilling or unable to remedy.

In case of the failure or refusal of the board of trustees to remedy gross abuses in the institutions, investigation and action by the grand jury may be resorted to, but much harm may be done before the grand jury is convened, and, even if it happens to be in session, its membership is not likely to contain anyone having special or expert knowledge of charitable or correctional work and therefore able to discover any except obvious abuses or to suggest the proper remedy. Objections somewhat similar to these may also be urged against legislative supervision, which antedated any form of administrative supervision over the institutions and still exists. Members of legislative visiting committees are seldom men with wide knowledge of the most advanced methods of institutional management, such control as these committees are able to exercise can only be spasmodic, and their occasional visits are usually perfunctory and may even degenerate into "junkets," which are harmful to the inmates as well as a useless expense to the state. Party considerations are apt to affect the findings of such committees if any findings are reported, but usually no report of the visitation is made for the information of the other members of the legislature and of the general public. As a means to delocalize the institutions under separate boards, legislative supervision has had little success.

In addition to legislative supervision, most states have established some form of administrative supervision over the

management of the state institutions by the separate boards of trustees, or have centralized the management of the institutions in the hands of a single board of control, or both. It will be noted that these new boards differ from the separate boards of trustees in that the former are either not managing or administrative boards, or, if so, they have control over more than one institution. Probably the first of the new boards in the correctional field was that of the Inspectors of State Prisons, created by the New York Constitution of 1846, which provided that it should consist of three members, elected by popular vote and should have charge and superintendence of the state prisons, and should appoint all the officers therein. As early as 1851 there was established in Massachusetts a state Board of Alien Commissioners, having special powers over certain classes of paupers, but the first state board of charity having general powers of supervision over state institutions was the Massachusetts State Board of Charities, created in 1863. New York and Ohio followed suit in 1867 and since then charitable and correctional boards of one kind or another have been established in more than three-fourths of the states. These boards may be classified and sub-classified in various ways, but we may note particularly the divisions into which the boards fall in accordance with two main bases or principles of classification. In the first place, they may be classified in accordance with the character of the work performed by the institutions or on the basis of the authorities over which they exercise their powers. In the second place, they may be classified in accordance with the nature and extent of the powers which they exercise over such institutions or authorities. The first has to do primarily with kinds of institutions; the second primarily with kinds of powers.[5]

[5] Still another classification of the state agencies might be into boards and single commissioners. The latter plan is found in New Jersey and Oklahoma.

Under the first principle of classification, the states may be divided into those in which all the charitable and correctional institutions are under the management or supervision of a single board, and into those in which the institutions are divided into groups, each such group being placed under a state board. The first plan is found, as a rule, only in the case of early boards, or in small states, or in states having central boards of control. Thus the Massachusetts Board of Charities was originally authorized to supervise the whole system of state charities and correction. The Ohio and Pennsylvania Boards of State Charities, established in 1867 and 1869 respectively, were given functions of equally wide scope. In Rhode Island all the state institutions were located on a single farm and placed under one board. In a number of states, however, the various institutions are divided into more or less homogeneous groups and each group placed under a separate board. The most conspicuous line of division between the institutions, of course, is that which runs between charitable and correctional institutions, and this separation early appeared. Thus, in 1879, the supervision of the Massachusetts Board of Charities over correctional institutions was taken from it and transferred to the newly created State Board of Prison Commissioners. As the number of institutions and inmates increase, more minute classification of the state's dependents and delinquents becomes possible, and the group system of institutional control or supervision becomes more prevalent, particularly in the larger states. The group system is now found in New York and Massachusetts, in both of which states the institutions for the care and custody of paupers, lunatics, and criminals are respectively under the supervision of separate boards. In some states the group system is found in only a partial state of development; that is, it has been applied to some institutions, while others are still left under separate boards. The care and treatment of the different classes of inmates are so

dissimilar, that the division of labor and specialization introduced by the group system enables the state board to maintain a more effective supervision over the institutions assigned to it. The methods of business management of the various classes of institutions, however, do not vary so much as the proper scientific methods of treating the various classes of inmates, and the advantages of the group system, therefore, are less in the case of a board of control than in that of a board having merely supervisory powers. In states which have adopted the central board of control system, the tendency is to place all institutions, charitable, penal and reformatory, under the management of this board. Thus, Iowa, Minnesota, and Ohio are among the states in which the powers of the state board are extended over all the charitable and correctional institutions. In many states, the tendency is away from the group system or from the system of separate institutional boards towards a more consolidated system of management. The group system is a compromise between separate control for each institution and complete consolidation.

Under the second principle of classification, namely, with regard to the kinds of powers exercised, the various state boards may be roughly divided into supervisory boards and boards of control. The supervisory board is the weaker of the two from the standpoint of the extent of centralization, and, as the less radical step in this direction, was usually the first to be taken. Nearly all the early boards in states east of the Mississippi River, such as Massachusetts, New York, Pennsylvania, Ohio, Indiana, and Illinois, belonged to this type. The second type, namely, the state board of control, or central administrative board, is more usual in the Western States. Although early examples of this type of board were established in New York and Rhode Island in 1847 and 1869 respectively, its main development began with the organization of the Kansas State Board of Control in 1873, and

since then boards of this type have been established in Wisconsin, Iowa, Minnesota, North and South Dakota, Ohio and other states.

A type of organization somewhat related to that of the supervisory board is the state charities aid association. This is in reality a private organization, but may be given official powers of visitation and report. It may be practically the only state supervisory agency, as was formerly the case in New Jersey, or it may exist in addition to the state supervisory board, as in New York. In spite of its limited powers, it has accomplished some desirable reforms in New Jersey, and has supplemented the work of the State Board of Charities in New York.

Among the distinguishing characteristics of the supervisory type of state board are that it is superimposed upon the separate boards of trustees of the individual institutions, and that its functions consist principally in making visits, inspections and investigations, giving advice, criticisms, and suggestions to the managing boards and officers of the institutions, making reports and recommendations to the governor and legislature, and keeping the general public informed as far as possible in regard to the existing and more advanced methods of conducting the institutions under its supervision. The purpose originally in view in the establishment of the supervisory board was that it should constitute the "eyes of the legislature," so to speak, and thus relieve the latter body, to some extent at least, from the duty of inspection which it had hitherto performed spasmodically. These supervisory boards have been composed, for the most part, of public-spirited men and women,[6] who have had sufficient interest in the work of the institutions to give their services to the state

[6] Governor Tilden of New York, who was the first to appoint a woman to membership on a state board of charities, remarked felicitously that he did so in order "to plant a sprig of grace in the barren wastes of the board."

practically without compensation except for expenses. The State Board of Charities of New York is composed of twelve members, one from each of the nine judicial districts of the state, and three members from New York City, all appointed by the governor and senate for a term of eight years. The term is in reality longer than eight years, for the members are generally reappointed. Political considerations enter very little into the appointments, but the three sects, Protestant, Catholic, and Hebrew, are usually represented. It is said that, during the first thirty years of the history of this board, no change in its personnel occurred except by death or resignation. It should be noted that in a large state like New York, with hundreds of institutions and thousands of inmates, the work of inspection and supervision cannot be adequately performed in person by an unpaid board, whose members are not expected to give their whole time to the work. The degree of effectiveness of the work of such boards, therefore, is largely determined by the ability, tact, and wisdom of the paid secretary, who, with the staff of inspectors, carries on much of the actual work. Secretaries of state boards of charities are usually, but not invariably, appointed by the board. As a rule, the board itself is the fittest and most competent authority to appoint its own secretary.

Theoretically, perhaps, the supervisory board has no direct, positive power of effecting needed reforms in the management of the institutions nor any direct means of compelling the adoption of its suggestions and recommendations. Nevertheless, a purely advisory board can and does effect many reforms, correct many abuses and prevent others from arising by means of its power of disseminating information and bringing to bear the full light of publicity upon the conditions which it finds. It has often been said that no abuse can long continue except in the dark, and the function of the purely supervisory board is to shed the light of publicity into every corner of the state system of charities and correction.

The history of state supervisory boards shows that publicity has undoubtedly been a very effectual weapon in many cases. The usefulness of this weapon, however, is limited, as a rule, to the correction of such gross and obvious abuses that the average man, having no special knowledge of the matter, can appreciate their injurious effect upon the charitable and correctional system of the state. As a remedy for more subtle but perhaps equally serious evils and as a means to induce managing boards and officers to adopt more scientific and up-to-date methods of care and treatment, publicity is not always availing, and more direct and positive power is needed by the board if it is to be able to compel the carrying out of its suggestions and recommendations.

There are, however, at the present time scarcely any purely advisory state boards of charities and correction. Where a board wins the confidence of the general public by evincing a capacity for excellent work, a tendency is apt to develop on the part of the legislature to confer upon it various administrative or executive powers, so that it ceases to be purely advisory. In the case of most boards which were at first almost, if not quite, purely advisory, there has been a fairly steady development toward giving them additional powers of an administrative character. As a rule, however, these additional administrative powers are either of a negative sort, such as the power to veto proposed plans and specifications for new buildings or enlargements of the existing plant, and the power to disapprove the fitness of associations applying for incorporation as private charitable organizations, or else they relate to some special field of work, such as establishing rules for the admission, retention, transfer, and discharge of inmates, the placing of dependent children in homes, and prescribing uniform methods of making reports and of keeping records and accounts. In order that they may not be obstructed in making investigations of institutional management, many of these boards also have the power to adminis-

ter oaths and to require the attendance of witnesses and the production of books and papers. The vesting of some administrative powers in supervisory boards has seemed necessary in some cases in order to accomplish needed reforms, but it has been feared by some persons that there is an incongruity and even incompatibility in the combination of supervisory and administrative powers in the hands of one board, and that the net result may be to impair the prestige and influence of the board. This view, however, does not seem to have been fully borne out in actual practice unless the additional administrative powers are so extensive as to amount to virtual management of the institutions. In some cases, administrative powers have been conferred upon supervisory boards to such an extent that it is difficult to distinguish them from boards of control. The California State Board of Control, for example, though really a supervisory board, has very extensive administrative powers. In 1906, Kentucky attempted to ride the two horses of supervision and management at the same time by giving its state board both controlling and supervisory powers to almost the same extent. "In their supervisory capacity, the members of the board visit and inspect the institutions of which they are themselves the managers, and under these circumstances it should not be difficult for them to find their own work as managers deserving of their highest commendation as supervisors." [7] So long, however, as the state board does not appoint the superintendents and officers of the institutions and the separate boards of trustees for each institution are not abolished, the state board may be classed roughly as supervisory.

The second main type of state board, classified with reference to the extent of its powers, is the state board of control, or central administrative board. Among the distinguishing characteristics of this type of board are that it is composed

[7] New York State Library, *Review of Legislation*, 1906, p. 35.

of a small number of salaried members, appointed by the governor and senate, who presumably give their whole time to the work, and that it supersedes the separate boards of trustees for the individual institutions and assumes the management and control of all or several of the state institutions. While the supervisory board is an additional wheel in the machinery of state administration, the establishment of the state board of control decreases the number of state agencies dealing with charitable and correctional matters. Under the board of control plan, each institution ceases to be virtually a small kingdom in itself, without effective connection with other institutions or with the state government, and becomes a unit in the consolidated, centralized system of management and control through the state board. The board of control may be established either as a substitute for a supervisory board, as well as for the separate boards of trustees, as was done in Wisconsin and Minnesota, or in place only of the separate boards of trustees where no other state board existed, as in Iowa, or in place of the separate boards but not as a substitute for the supervisory board, which still continues, as in Illinois.

A state board of control is a public corporation with power to sue and be sued, and to hold and convey the title to property. Just as the supervisory board has some administrative powers, so the administrative board of control is usually given under the law some supervisory powers, such as those of visitation, inspection and investigation. These, however, are comparatively subsidiary and incidental to its administrative powers, which include general control of practically every element of the administration of the various institutions subject to its power. Among the most important of these elements of administration over which the board has control are the appointment and removal of the superintendents of the various institutions, the fixation of the salaries of all employees of the institutions, and the purchase of the

necessary supplies. In the exercise of these important powers lie the greatest possibilities, both for good and for evil. The exercise of these powers by a board of the highest ability, integrity and conscientiousness may bring the administration of the institutions to a very high plane of efficiency, but in the hands of less worthy persons, they may result in great injury to the institutions.

One of the principal dangers which loom up in the case of a state board of control is that the power of the board to appoint officers and employees may be used for partisan-political purposes. Where the members of the board themselves are appointed largely because of their party affiliations, the same considerations are apt to influence the actions of the board in making appointments. The laws creating the board usually require that not more than a bare majority of its three or five members shall belong to the same political party, but a bi-partisan board is by no means necessarily a non-partisan board. There have at times been complaints of political influences in the appointments to and of the boards in such states as Kansas and Wisconsin. In a number of states having boards of control, there have been far too frequent changes of the superintendents, as well as lesser officers and employees of the institutions, entailing a lack of continuity of policy and even, at times, general demoralization. These abuses, however, have steadily decreased with the spread of the merit idea in civil service, and have seldom, if ever, been so great as they were under the old system of separate boards of trustees. In states having state-wide civil service laws, such as Illinois, the power of the board to appoint the employees of the several institutions is generally limited by the operation of such laws. Iowa goes further still and withholds from the board the power to appoint or remove the subordinate officers or employees of the institutions, and prohibits the levying on them of political assessments. This is decidedly the better plan. Even if political

considerations should not enter, it is of doubtful wisdom to give the board the power of appointing, over the heads of the superintendents, the subordinate officers and employees upon whom the superintendents are largely dependent for the carrying out of their policies. Having full power over the selection of the superintendent, the board has no one to blame but itself if the superintendent is not a competent man, and, if he is a competent man, he should have power to select his subordinate officers and employees without the interference of the board and even without the restrictions of civil service rules. Laws which prohibit boards and superintendents from filling the payrolls of their institutions with the names of their political henchmen and of their relatives by blood and marriage are temporary makeshifts and confessions of weakness. The prime *desideratum* is to secure the services of boards and superintendents who would not do so, even if they had the power.

It is particularly in connection with the fiscal affairs of the state institutions that the state board of control plays an important rôle. Not only does it fix the salaries of nearly all the officers and employees of the institutions, but also makes contracts for the purchase of supplies. In institutional management the greatest opportunities both for waste and for economy probably arise in connection with the purchase of supplies. Under the system of separate boards of trustees, even where there is no graft or favoritism, there is much waste in the purchase of supplies on account of the excessively high prices paid for relatively small quantities of goods. If several or all of the state charitable and correctional institutions combine for the purchase of supplies, the chances are that, other things being equal, they will be able to secure a better quality of goods at lower prices than could each institution acting separately.[8] Even if the prices paid

[8] An exception to this might be found in the more perishable articles which can advantageously be purchased in the local markets.

were not lower, a combination of institutions could more easily adopt standard specifications for staple articles and more easily employ experts to test the quality of goods delivered to see that they meet the specifications. In order to bring about the system of joint purchase, however, it is not essential that a state board of control be established. Even in the case of separate boards of trustees, some advance in the economy of purchases may be effected through the requirement of uniform reports to be made periodically by the various institutions to the state supervisory board, making it easy to compare the prices paid for the same article by different institutions. Such publicity is apt to engender a healthy rivalry among the institutions, each striving to make a showing of economical management. This, however, is not joint purchase, and some of the economies inherent in large-scale buying could not be secured under this system. A plan of joint purchase without the establishment of a board of control is found in New York, where the office of fiscal supervisor of state charities was created in 1902. This officer, appointed by the governor, is given practically complete control over the financial affairs of the state charitable institutions. The superintendents of these institutions are required to submit periodical estimates of their expenditures to him for approval and revision. It is also provided that joint contracts for the purchase of certain supplies may be made by a committee of superintendents appointed by the fiscal supervisor, such contracts to be subject to his approval.[9]

[9] The central control over the purchase of supplies in New York was subjected to a thorough investigation by Mr. H. C. Wright for the New York State Charities Aid Association and the results published in 1911 under the title "Methods of Fiscal Control of State Institutions." His findings were that the fiscal supervisor had striven primarily to save money and only secondarily to promote the welfare of the inmates, and as a result had attained cheapness without economy; that the fiscal supervisor had so administered his office as to discourage the ambition of the superintendents, lessen their responsibility and decrease the amount of attention and strength which they

The fiscal supervisor, as organized in New York, is an officer charged only with the financial oversight of the institutions. It is true that this power over financial matters may enable this officer to control in large measure the manifold details of institutional life and management, but his primary interest and object is apt to be fiscal rather than humanitarian. The work of the state board of control, on the other hand, is broader. Its object is or should be not only to see that the institutions are economically managed, but to appoint the best qualified superintendents available and to take care that the inmates are afforded the best care and treatment possible under the circumstances. A board of control, therefore, gives a relatively less amount of attention to purely fiscal matters than does a fiscal supervisor, and while this may have some disadvantages, it nevertheless tends to broaden the attitude of

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could give to the care of the inmates; and that, inasmuch as the fiscal supervisor could not give his personal attention to all the details of his office, the requests of the superintendents for badly needed articles were sometimes turned down by clerks in the central office who had no adequate knowledge or acquaintance with conditions in the institutions. He found also that the quality of beef and other articles furnished the institutions was much lower than that specified in the contract. In Part II of his report, he made a comparative study of the methods of fiscal control in New York, Indiana and Iowa. He found that it cost $1.00 to supervise $46.30 expended by the institutions in New York, while for the same amount Indiana obtained a supervision of $78.80. In Iowa the same amount paid for the supervision of $54.80. The cost per inmate of such supervision in the three states was: Indiana, $2.85; Iowa, $3.70; and New York, $5.18. The report tends to show that, while central control of purchases of supplies may be economical up to a certain point, beyond that point no proportionate gain is likely to be secured. It is to be noted that the findings of the report with reference to the methods obtaining in the three states compared are not conclusive as to the comparative merits of these methods or systems in themselves, but only as actually administered in the particular states selected. It should be added that, since the Wright report was made, there has been a considerable improvement in the administration of the office of fiscal supervisor. Governor Whitman, however, in his annual message of 1916, recommended that this office be abolished.

the board and to work for the best interests of the institutions. A compromise which aims to secure the advantages of the broader point of view of the board and also of the specialized knowledge of the fiscal supervisor is found in Illinois, where the fiscal supervisor is one of the members of the board, and exercises his powers in connection with the fiscal affairs of the institutions in coöperation with, and under the supervision of, the board. The coöperation of the superintendents of the various charitable institutions in the consideration of fiscal matters wherein their familiarity with conditions is of value is also secured in Illinois through the annual meetings of the Board of Joint Estimate, composed of the superintendents of the several institutions and a committee of the State Board of Administration.

The question as to the relative merits of the state board of control and the state supervisory board was formerly much debated. In favor of the state board of control, it was argued that centralized management conduces to financial economy through the reduction of "over-head" expense or administrative charges, such as the elimination of duplicate clerks, through large-scale buying and safeguarding deliveries, and through uniformity and standardization of accounts, records, reports, specifications, and business methods. Furthermore, such a board would conduce to administrative efficiency, since its members give their whole time and attention to the work, whereas supervisory boards, serving without pay, are not apt to be so well trained, so familiar with conditions, nor so constant in their attention to the duties of the office. Again, it was pointed out that the board of control system largely does away with the influences which placed the state institutions practically under local control, and also destroys the pernicious local lobbies which worked at every legislative session for increased appropriations for the separate institutions.

On the other hand, those who favored the supervisory

board system pointed out that, from the standpoint of financial economy, a system of joint purchase of supplies might be instituted without creating a board of control, and that boards of control were too apt to emphasize the financial and business side of management, and neglect the more important object of efficiency in the adaptation of methods of care and treatment to the needs of the inmates of the different institutions. They argued that the administration of the institutions by the board of control is apt to become rigid, bureaucratic, and mechanical, and to discourage ambition, initiative and originality on the part of the superintendents in developing improved methods of care and treatment. Interest in general problems of charity and correction and the education of the public in such matters, it was asserted, were not fostered to any considerable extent by the board of control. Furthermore, attention was called to the greater opportunities which the board of control system offers for the distribution of patronage to party workers and the greater danger of partisan politics and the spoils system being injected into the management of the institutions. Finally, perhaps the most important objection of all was that the board of control was subject to no adequate supervision by any other state agency.

It is not necessary for us now to weigh these conflicting arguments and make a decision between them. Conditions in the several states are so different that it cannot be inferred that a system which works well or ill in one state will necessarily do the same in another. Moreover, the character of the men and women who occupy positions on the board is frequently a more important factor than the particular type of board. Furthermore, it is now recognized that there is no necessary incompatibility in the existence of the two types of boards side by side in the same state. It is recognized that in the administration of charities and correction, there is a financial or business side and a professional or humanitarian side. Business management is best represented by a board

of control, while the promotion of advanced, scientific methods of care and treatment of inmates and the advocacy and adoption of broad social measures for the prevention of moral, mental and physical disease are services which can be best performed by supervisory boards, composed of public-spirited, philanthropic, disinterested men and women, imbued with love for the work and coöperating with competent superintendents.

The realization of these facts has received its concrete manifestation in the introduction of the dual system of simultaneous control and supervision by separate state agencies. From 1881 to 1890 Wisconsin had both a central board of control and a state supervisory board, but there was no conscious attempt to establish a workable dual system, for, at that period, the two boards were still considered essentially incompatible. In 1902 New York introduced a modified form of the dual system in connection with its charitable institutions and in 1905 in connection with its insane asylums. In 1907 Minnesota established a state board of visitors with supervisory powers in addition to the existing board of control. Probably the best example of the dual system, however, is that found in Illinois, where, since 1909, there has existed a state board of administration with powers of management and control, and also a state charities commission with purely advisory powers. One of the chief objections that might be urged against the dual system is the possibility of conflict or lack of coöperation between the two boards. Where the supervisory board, however, is given no administrative powers, as in Illinois, the danger of such conflict appears to be slight. It should be pointed out, moreover, that even from the standpoint of financial economy the dual system has this advantage, that, while the board of control may endeavor to secure the more immediate economies, the ultimate function of the supervisory board is to promote the much more far-reaching and important economy of securing, by preventive measures,

a proportionate decrease in the number of persons dependent on the state's care, and thus incidentally decrease the expenditures of the state for this purpose. It is true that the introduction of scientific methods of care and treatment may in some cases prolong the lives of inmates without effecting such a cure as to warrant their discharge from the institution, and thus tend to increase the total number of inmates. But it should be possible to counterbalance this tendency and to decrease the total amount of dependency through the operation of enlightened measures of prevention and social control, combined with time and patience. In order to institute such measures of prevention, the powers of the state agency would have to be broadened so as to include some degree of supervision not only over the inmates of institutions, but also over the activities of the people at large.[10]

Although the two boards in the dual system may be assigned entirely different functions so as to avoid the danger of conflict, nevertheless, this system is somewhat lacking in the elements of simplicity and definiteness of responsibility. Any reorganization of the system should be made in the light of two factors in the situation: first, that the whole system should be directly linked with one of the chief executive departments of the state government, and, secondly, that, other things being equal, a single commissioner is more efficient as an executive body than a board, while as an advisory body a board is to be preferred. A plan which, to some extent, recognizes these factors was proposed in 1914 by the Massachusetts Commission on Economy and Efficiency. According to this proposed plan, there was to be a board having general supervision of all the state charitable and correctional institutions, but the actual management of the institutions was to be vested in a single commissioner or director appointed by the board. The director was to have power in

[10] Such extended authority has been conferred upon the Board of Public Welfare of Kansas City, Mo.

turn to appoint such deputies, executive secretaries, superintendents and other officers as might be necessary to carry on the administration of the institutions in its various divisions.[11]

Before concluding this chapter, a few words should be added in regard to certain topics which relate more particularly to penal and correctional administration. These include such matters as prison control, the indeterminate sentence, pardon, parole, probation, and convict labor.

The theory of the law in regard to the treatment of the criminal is fundamentally that of punishment, and the protection of society, with lesser emphasis on reformation and the prevention of crime. The penal law is enacted by the central state government, but, on account of the considerable degree of administrative decentralization which still prevails, the carrying out of the law is not altogether in the hands of the state authorities, but is shared, as we have seen, by local officials, who, in most of the American states, administer the local penal institutions, subject usually to more or less supervision by the state. Not only is the sphere of action of the state administrative authorities curtailed by the extent of the control exercised by local officials, but also by legislative interference in matters which belong more appropriately to the administrative or judicial authorities. This excessive legislative control, however, has been gradually modified in various ways. For example, the Constitution of the United States has deprived the state legislatures of the power of passing

[11] The proposed New York Constitution of 1915 provided for a state department of charities and correction with a secretary at its head, who should have power of inspection and supervision over all state charitable institutions, state hospitals for the insane, state prisons and other state correctional institutions. In the Illinois Constitutional Convention of 1870, the proposition was brought forward to create a superintendent of public charities, with supervision over all the charitable institutions of the state, but it was not adopted. *Debates and Proceedings,* i, pp. 749-753.

bills of attainder, and, by implication, bills of pains and penalties. Again, judicial discretion has been increased through the practice of fixing in the penal law maximum and minimum degrees of punishment for particular crimes, through suspension of sentence and conditional release. Finally, the power and discretion of administrative officials has been increased through the so-called indeterminate sentence and the parole.

When the main object in penal legislation and prison administration was the punishment of the criminals and their segregation from society, little attempt was made to classify the criminals themselves or to segregate properly certain classes of them from others. With the growth of the idea of reformation of the criminal, however, classification of criminals and the segregation of the different classes from each other has come to be regarded as a necessary prerequisite to reformation. The principal classifications are into male and female, old and young, and habitual and first offenders. At first, separate cells or compartments in the same building were provided for the different classes, and this is sometimes the only kind of separation attempted. Many states, however, have now established entirely separate institutions for the detention of these different classes of offenders. Separate state prisons for women and reformatories, sometimes called reform schools or houses of correction, for youthful and first offenders, increase the possibilities of the reclamation of these classes of delinquents to the ranks of normal society.

Another essential prerequisite to the reformation of the criminal is that he should not remain idle during confinement. The disciplinary effect of labor is recognized as an important element in fitting and educating him again to take his place as a normal, industrious member of society. A secondary object in affording work to the prisoner is that he may contribute, at least in part, to the expense of his main-

tenance and thus reduce the burden upon the taxpayer, and to this end his labor should be economically productive in character. The labor should also be of a kind, if possible, which affords industrial training and thus better fits the prisoner to become a productive member of society when he is released from custody.

Although the desirability of convict labor as a general principle is everywhere admitted, there is much difference of opinion and diversity of practice in the application of the principle. Difficulties arise in connection with the process of production or the conditions under which it shall be carried on, and also in connection with the distribution of the product. The thirteenth amendment to the Constitution of the United States recognizes by implication that involuntary servitude may exist as a punishment for crime whereof the party shall have been duly convicted. Under this theory, the productive value of the convict's labor becomes the property of the state, and may be disposed of by the state in such manner as it sees fit. The convict laborer has no legal right to compensation, but the state may, and as far as practicable should, accord it to him or to his family.

A method of disposing of convict labor which was formerly prevalent and is still found in some states is that known as the contract system, or lease system, under which the labor of the convicts is let to contractors either at a per diem rate or on the piece-price plan. Under both the contract and the lease system, the convicts are in the employ of the contractors, but these systems differ, in that under the former the labor is usually carried on in the prison under the direction of the prison officials, while under the lease system, the contractor has greater control over the discipline of the prisoner and the direction of his work. Although the contract system is the better of the two, both are highly objectionable, and in practice have been productive of gross abuses, because the contractors are sometimes unscrupulous and, at best, have

little interest in the convict except to get out of him the largest possible amount of work.

These systems are both giving way to that whereby the laborer works for the state and not for a private contractor. This plan may take the form of labor in the construction and repair of roads and other public works. Such outdoor labor has a beneficial effect upon the health of the men, and the system of placing men in this work upon their honor, has, when operated under proper restrictions, worked well in some states. This method of working prisoners, however, is open to the objections that, if carried on in frequented places, it may hinder the reformation of the prisoners by subjecting them to the disgrace of public ridicule, and that it does not train them for any skilled occupation when released.

The state as the employer of convict labor acts under two plans or systems, known as state account and state use. Under these plans, the state prison becomes a sort of state factory or industrial plant for the production of articles either to be sold in the open market or to be used by the state, or both. A board known in several states as the State Board of Classification, composed in New York of the Fiscal Supervisor of State Charities, the State Commissioner of Prisons, the Superintendent of State Prisons and the State Hospital Commission, fixes the styles and prices of prison-made goods. When the goods thus produced are sold on the state account plan in the open market, the state thus becomes a direct competitor with free labor. Since the state is not subject to the same economic laws as private employers of labor, this competition might prove a serious injury to free labor, were it not that the total amount of prison-made goods is only a small fraction of one per cent of the whole mass of goods produced in the country. Nevertheless, the hostility of labor unions to direct state competition in the open market has been an important influence in bringing about the introduction of the state use plan. Under this

plan, prison-made goods are used in the public institutions of the state or of its political divisions. This system was first established in New York in 1897. In that state the products of prison labor can be disposed of in no other way, but other states in which the plan has been introduced, such as Illinois, provide that any surplus of prison products up to a certain extent which cannot be used in the public institutions may be disposed of in the open market.

The operation of the state use plan has not been without difficulties. Although competition with free labor is indirect, it has not been, and cannot be wholly, eliminated. The production of certain articles and certain lines of work have sometimes been excepted from the range of prison industries, apparently for no other than political reasons. In order not to compete too much with any particular line of industry, an attempt has been made to diversify prison labor as far as possible, but this has entailed large expense in the installation of machinery and in other ways. The business management of prison industry has sometimes tended to distract the attention of wardens and other prison officials from other equally important duties. Public institutions have sometimes been compelled to pay for inferior grades of articles and supplies. The New York law requires state, county, city, and village authorities to furnish the State Commission of Prisons annually an estimate of prison-made goods necessary to be purchased during the ensuing year, and further makes it the duty of such authorities to make requisition upon the Commission for such articles used by them as are manufactured in the state prisons. Purchase of such articles elsewhere, without the certificate of the Commission showing inability to furnish the goods required, is made a civil and criminal offense. The Commission has complained, however, that the law is almost completely ignored by many municipalities, which have for years neither submitted the required estimates nor purchased any prison-made goods, and as a result

many convicts are left in idleness. State use is probably the best system yet evolved, but it is evident that it is by no means an ideal plan, and the problem of convict labor, with its vast social implications, is as yet a long way from a satisfactory solution.

What amount of discipline and training is necessary to reform a criminal, and who is to have the power of determining when the process of reformation has been completed? Although the criminal law is based largely on the idea of punishment, there is also involved the idea of protection to society at large. The criminal law provides for the punishment of specific crimes by imprisonment for a term of years, either definite or within limits. The presumption of the law is, not only that incarceration for that term of years will satisfy justice and provide adequate punishment for the offense, but also that, at the end of such period of punishment, the offender will have been sufficiently cured of his evil tendencies to make it safe to again turn him loose upon society. If this can properly be said to be one of the ends of the criminal law, it must be admitted that it frequently fails to attain it. This is evidenced by the large number of released prisoners who again fall into criminal ways. Moreover, the wide difference in the penalties provided in different states for the same nominal offense indicates that the system of legislative fixation of terms of imprisonment for particular offenses is largely guess-work and without scientific basis. It is impossible for the legislature to fix a definite penalty for a certain crime which will fit all cases. In view of this fact, various modifications in the definite sentence laws have been made. The existence of the pardoning power in the governor is a means of softening the rigidity of the definite sentence law where it would work hardship in particular cases. Moreover, provision may be made in the law for shortening the term of imprisonment as a reward for good behavior, or for life sentences upon the third conviction for

a felony.[12] The discretion of the court may be widened by a law providing maximum and minimum terms of imprisonment for particular crimes, the exact term to be fixed by the court. In view of the principle, however, that no prisoner should be released until such time as he gives satisfactory evidence that this step can be taken with safety to his own interests and to those of society, even the court is frequently not in a position where it can intelligently settle in advance the length of sentence necessary to effect a satisfactory reformation of the offender.

In order to meet this situation the so-called indeterminate or indefinite sentence has been provided by law in a number of states. Under this law the function of the court is limited to determining whether the accused is guilty. If so, the question as to the length of his term is left to the administrative authorities of the institution to which he is committed, or to a special board, within the maximum and minimum limits fixed by law. The indeterminate sentence was first put into operation in this country in connection with the Elmira Reformatory in 1877, and it is in connection with reformatory rather than penal institutions that it finds its most appropriate application. The effect of its introduction has been to increase the average length of time served by prisoners, as compared with the definite sentence plan. The determination of the question as to whether the discipline and training which the prisoner has received has been sufficient to qualify him again to become a normal member of society is a matter of such delicacy and responsibility that it should be undertaken only in those institutions whose officials have adequate means of judging.

Even under the best of conditions, human judgment is, of course, fallible, and, in order to guard against errors of judgment resulting in premature release, the principle of the parole is combined with that of the indeterminate sentence,

[12] Acts of Indiana, 1907, Ch. 82.

to which it is the natural complement and corollary. The date of his discharge is one of the most momentous in the life of the convict. No matter how complete his reformation may have appeared to be while in prison, if, upon his release, he finds all the world against him, he is apt to relapse into his former ways. If, however, employment can be found for him and some oversight exercised over him, his chances of reformation are usually good. By parole is meant the conditional release from imprisonment of a sentenced convict at some point between the maximum and minimum limits of the sentence. The beginning of the period of parole is thus not full release, but imprisonment in the institution is succeeded by a probationary period of supervision or non-institutional control.

The important elements in an efficient system of parole are a competent board of parole and adequate supervision of the paroled convict by well qualified parole officers. The board of parole is composed either of the board of managers of the institution or of a special body of officers. In New York the board of parole for the state prisons consists of the state superintendent of prisons and two other members appointed by the governor, while the boards of managers of the reformatories and training schools act as boards of parole for their own institutions. In Illinois, the board of managers of the state reformatory acts in a similar capacity, but the state board of pardons, consisting of three members appointed by the governor and senate, releases prisoners on parole from the state penitentiaries. The number of parole officers is comparatively small even in the most advanced states, and many states have no special parole officers, strictly speaking, apart from the board of parole itself, to which the prisoners released on parole are required to report periodically. They may, however, be placed under the supervision of the sheriff or police officers. While on parole, the prisoner is still legally in the custody of the warden of the prison, and, if he

violates his parole, he is subject to be again taken into custody and imprisoned.

There can be little question as to the value of the indeterminate sentence and parole laws in making for the reformation of the prisoner. It is true that some of those released on parole relapse into crime, but not as many as under the definite sentence system. Objection to these laws may be based, however, upon faults in their drawing up or in their administration. They should not be applied to hardened felons nor to petty misdemeanants. Moreover, in order to give the working of the laws a fair trial, there should be more competent boards of parole and more adequate supervision of prisoners on parole.

What shall be done with petty misdemeanants and first offenders for whom imprisonment seems unnecessary? The answer to this question is found in the system of probation. By this term is meant the conditional release of a prisoner by the court, and commitment to the care of a probation officer before imprisonment. The sentence or its execution is suspended during such time as he is in the care of the probation officer, but if he does not demean himself well, such officer may bring him before the court to be sentenced. As early as 1869 Massachusetts provided for a form of probation in juvenile cases, and in 1878 extended the system to adult offenders. Her law on the subject has been substantially copied by a number of states. It provides for the appointment of the probation officers by the courts. In some states, police officers are selected for this work, but their suitability for it is very questionable. In Massachusetts and New York there are state probation commissions, which exercise general supervision over the work of probation officers, whose appointment should probably be subject to the approval of such commissions, for upon the character of the probation officers depends to a considerable extent the success of the system. The work of probation and parole officers is similar

in character, and there is no good reason why both kinds of work should not be performed by the same officers, as has been authorized by law in New York. Both classes of officers should be under the effective supervision of the same central state authority, which should in turn be closely connected with the general state department of charities and correction.[13]

The indeterminate sentence, parole and probation systems are designed to prevent the increase of crime by bringing reformatory influences to bear upon those who are not confirmed criminals, but who have evinced criminal tendencies. They are in line with the most advanced thought in the science of criminology. More important than the conservation of natural resources is the conservation and the reclamation of the human resources of the states, and the success of charitable and correctional administration is to be judged by the degree of success with which these ends are attained.

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[13] The constitutionality of indeterminate sentence, parole, and probation laws has been attacked on various grounds, particularly in that they encroach upon the constitutional power of the governor to grant pardons, reprieves, and commutations. This view, however, has not generally been taken by the courts. See George *vs.* People, 167 Ill., 447; Dreyer *vs.* Illinois, 187 U. S., 71; Woods *vs.* State, 169 S. W., 558. The unconstitutionality of the Illinois parole law is avoided by making the final release of the prisoner dependent upon the approval of the governor. Cf. Freund, *Police Power,* p. 104, and see People *vs.* Nowasky, 254 Ill., 146.

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CHAPTER XIV

PUBLIC HEALTH ADMINISTRATION[1]

Measures for the protection of the public health in this country were at first taken primarily for the purpose of preventing the introduction of disease from foreign countries and took the form of the establishment of quarantine against vessels hailing from ports at which contagious diseases were prevalent. On this account, public health administration in this country developed first in those states having important seaports, such as Massachusetts, New York, Pennsylvania, Maryland and Louisiana. Such measures as were taken at the earliest times were in the hands of the regularly constituted authorities at the several ports of entry acting under the general governmental power, and not in those of officers specially created for the purpose.

Such early attempts at the establishment of quarantine, however, were evidently ineffective, as numerous epidemics of various communicable diseases periodically visited the principal seaports and spread into the interior. Some of these epidemics doubtless originated as well from conditions in the cities favorable to the propagation of diseases, and others were increased in virulence thereby.

The growth of the leading cities on the Atlantic coast in size and density of population increased both the danger of disease and the importance of public health measures. The need of special machinery for combating disease in the sea-

[1] This chapter is a reprint of a portion of the author's report on "Public Health Administration," contributed to the *Report of the Efficiency and Economy Committee of Illinois,* pp. 670-687.

coast cities was apparent. This machinery was at first for the most part purely local in character, and all over the country, the establishment of local health authorities has, as a general rule, preceded the organization of state health authorities. Local health authorities were organized in Baltimore and Philadelphia in 1793 and 1794, respectively, and before the end of the eighteenth century New York City and Boston were similarly supplied.

Among the states, Massachusetts led the way by making provision, as early as 1787, for a state-wide system of town boards of health, followed by Connecticut in 1805. To such an extent was health administration considered a purely local function, that it was not until after the middle of the nineteenth century that a state administrative body was established. The first state board of health was established in Louisiana in 1865. This board was at first, however, merely a body for the enforcement of quarantine regulations at the port of New Orleans.

Already, in 1849, a commission had been appointed in Massachusetts to report to the legislature a plan for a sanitary survey of the state. Among other important and far-sighted recommendations of this commission was one for the creation of a state board of health, charged with the duty of enforcing the public health laws of the state. The recommendations of the commission finally bore fruit in 1869 when the first state body was established in Massachusetts having functions similar to modern boards of health.

The movement towards the establishment of state boards of health has been general and continuous, so that, at the present time, such boards are found in all the states and in the more important insular possessions. In California, Delaware, Florida, Louisiana, Oklahoma and Washington, the legislature is required by the State Constitution to establish a state board of health and in Texas that body is authorized to do so. The Constitution of Oklahoma requires the estab-

lishment not only of a state board of health, but also of a board of dentistry, board of pharmacy and a pure food commission. In the other states the authority for the establishment of state boards of health rests upon legislative enactment, without specific constitutional authorization.

Organization of State Health Authorities.—The principal central authority entrusted in each state with the administration of the public health laws is that known usually as the state board of health, but occasionally as the state board of health and vital statistics, or the state board of health and medical examiners. In addition to this board, there are also in many states other central boards charged, not with general supervision over matters relating to the public health, but with a certain special function or functions more or less closely connected therewith. One class of these special central boards have direct supervision over some particular matter connected with the public health, such as pollution of water supplies, sewage disposal, and food and drug inspection. Their functions tend to approach in character those performed by bodies having primarily to do with public safety or public works. In Illinois, for example, there is a state water survey and a state food commissioner and food standard commission, which are not under the control of the state board of health, but to which are assigned special functions relating more or less closely to the public health.

The second class of these special central boards is that composed of bodies charged with the functions of examining candidates for entrance into particular professions. Among such boards may be mentioned those intrusted with the examination and admission of qualified persons to practice as physicians, dentists, pharmacists, nurses, barbers, midwives, embalmers, opticians, chiropodists and osteopaths. It should be noted, however, that in a number of states the function of examining and licensing some of these practitioners is in the hands of the state board of health. Occasionally we find

that these special central boards are subject to a measure of control by the state board of health, as, for example, the regulations of the state board of barber examiners in Illinois must be approved by the state board of health before going into effect. As a general rule, however, these boards are entirely separate and independent bodies.

Working in conjunction with the state board of health we find also an executive officer, variously known as the state health commissioner, superintendent of health, or secretary of the state board of health. He may or may not be a member of the board. If a member, which is usually the case, he is apt to be either secretary or the presiding officer of the board, though this is not always true. His power varies from almost absolute control over the public health activities of the state to that of a mere clerical officer, exercising almost no discretionary authority.

State Boards of Health.—The number of members of the state boards of health varies from one in Oklahoma [2] to thirteen in Mississippi. The average number is about seven. In the large majority of states, they are appointed by the governor, usually with the consent of the senate. In a number of states, however, a portion of the members serve on the board by virtue of incumbency in other offices, such as the governor himself, the attorney-general and the state veterinarian.

With respect to some or all of those members who do not serve upon the board *ex officio,* most of the states require qualifications of various kinds. The most frequent requirement is that the board shall be composed in part or wholly of physicians. In about fifteen states an attempt to secure local representation is made by requiring the geographical apportionment of the members among districts, counties, or sections of the state. In about a dozen states it is either cus-

[2] Although the Constitution of Oklahoma required the creation of a state "board" of health, the legislature provided for the establishment of a state "department" of health in charge of one commissioner.

tomary or required by law that an engineer shall be appointed on the board.

A more recent tendency is toward the requirement that the membership of the board shall include one or more sanitarians. The increased attention being given to means of preventing disease is an assistance in accelerating this tendency. The New York Act of 1913 requires, for example, that the public health council shall consist, besides the commissioner of health, of six members, "of whom at least three shall be physicians who shall have had training or experience in sanitary science, and one shall be a sanitary engineer."

The terms of the members of state boards of health vary from two to seven years, the average being about four years. The members, other than the executive officer, are not expected to devote their whole time to the work, and are not usually, therefore, paid a salary. However, they are generally allowed a per diem and expenses for actual work.

The Executive Officer.—The executive officer, who is usually the secretary of the state board of health, is, in the majority of the states, appointed by the board itself. In others he is appointed by the governor, with the consent of the senate. He serves for a definite term in about half the states. This varies from one to six years. In the others, he serves for an indefinite term, which may be during good behavior, or during the pleasure of the board.

The salaries received by the executive officer vary from $200 per annum in Wyoming to $10,000 per annum in Pennsylvania. In the states where small salaries are paid, he, of course, is not expected to devote his entire time to his official duties. In only three states, however, California, Indiana and North Carolina, is he required by law to give all his time to the duties of his office, and in New York he is forbidden to engage in any occupation which would conflict with the performance of his official duties.

In all but nine states, qualifications of some sort are re-

quired of the executive officer. In many states, the executive officer is himself a member of the state board of health, in which case he is, of course, subject to the same requirements of qualifications which rest upon the other members of the board, but usually additional qualifications are required of him. The most frequent qualification found is that he shall be a physician. In a number of states this qualification is amplified into the requirement that he shall be an experienced physician.

The states which are furthest advanced in public health matters, however, are not content merely with the requirement that the executive officer shall be versed in medical science. The New York law, for example, provides that he shall be "a physician, a graduate of an incorporated medical college, of at least ten years' experience in the actual practice of his profession, and of skill and experience in public health duties and sanitary science."

The question of the relation between the executive officer and the state board of health, and the amount and kind of power entrusted to each, is an important one. In general, the working and action of the state department of health is apt to be less efficient in proportion to the extent to which the executive officer is subject to the control of the board in the performance of executive duties. The executive officer is more in touch with public health matters than the board, and has less difficulty in making up his mind in the face of an emergency as to what action should be taken, and is therefore able to take action more promptly than the board would, or than he himself would if subject to the control of the board. For these reasons the executive officer should be entrusted with entire control of executive matters connected with public health administration by the state department, subject only to the possibility of removal from office by the board for good and sufficient cause.

On the other hand, in the drawing up of sanitary regula-

tions and the adoption of general rules, which is in reality a legislative function, the participation, if not control of the board, is desirable. In such matters several heads are generally better than one. Even in such matters, however, it might be better to confine the board to advice and counsel, leaving the final decision to the executive officer. The moral support and aid through advice and encouragement which an able and progressive but not meddlesome or overbearing board may give to the executive officer cannot wisely be dispensed with. But the actual management and direction of public health administration in the state should be largely in the hands of the executive officer.

Actual conditions in the various states do not correspond, however, exactly to what may seem to be theoretically desirable. In many states the board is possessed of powers which it is not as well qualified to exercise as the executive officer; and in most states the board undertakes to exercise too great a supervisory power over the executive officer. The tendency, however, in the more advanced states, is undoubtedly in the direction of the increase of the power and influence of the executive officer.

In Oklahoma, as has been noted, the so-called state board of health consists in reality merely of a single commissioner. In New York, also, the board was so far eclipsed by the executive officer that, from 1901 to 1913, the former was dispensed with entirely. It is true, a public health council has now been established in that state, but its duties are confined mainly to advice and the enactment of a sanitary code for the state. It is expressly forbidden to perform any "executive, administrative, or appointive duties." In Pennsylvania, also, in 1903, legislation was passed which had the effect of centralizing authority in the hands of the executive officer. A board was retained, but it is almost wholly advisory in character.

In this connection, it should be mentioned further that in

those states where the executive officer is also a member of the board and where the other members of the board are wholly or partly *ex officio* in character, the tendency in such states is to centralize power in the hands of the executive officer.

Other Officers and Employees.—Below the executive officer there are a number of other officials employed at the central office of the state department of health. In addition to the necessary clerical force and office assistants, many states employ also a number of experts to attend to special phases of public health work. Among such experts are sanitary engineers to supervise the construction of public works designed to promote the public health, chemists to analyze samples of water, food and drugs, and bacteriologists for work in hygienic laboratories. Provision is also made in a number of states, including Illinois, Maryland, Louisiana and California, for the employment of special attorneys, whose business it is to furnish the state board advice as to legal matters, file complaints with the state's attorneys, and assist in prosecuting offenders against the public health laws. In the majority of states, however, no special attorneys are employed, but the attorney-general is depended upon to perform these functions, and in those states where special attorneys are employed, the appropriations are sometimes insufficient to secure an adequate amount of legal services.

The executive officer and the other employees attached to the central office do not constitute the whole personnel of the state department of health. The department must further be supplied with antennae which reach into every corner of the state in order that it may adequately safeguard the health of the people of the whole state. With the object of maintaining an efficient field force in all parts of the state, a number of the more advanced states have been divided into sanitary districts, with a state inspector in charge of state public health work in each district.

In New York the commissioner of health is required to divide the whole state, except cities of the first class, into twenty or more sanitary districts, and to appoint for each district a sanitary supervisor, who must be a physician. In Pennsylvania the state health commissioner divides the state into ten districts and appoints a health officer for each district at an annual salary of $2,500. Massachusetts is divided into a number of health districts which may be, in the discretion of the state board of health, as high as fifteen. In each district the state board appoints, with the consent of the governor and council, a state inspector of health, who must be "a practical and discreet person, learned in the science of medicine and hygiene." Though appointed for five-year terms, the state inspectors are liable to removal from office at any time by the state board. The inspectors perform important functions in enforcing public health laws regarding the abatement of nuisances, the sanitation of tenement houses etc., and in acting as intermediaries between the state board of health and the local health authorities.

From 1907 to 1912 the Massachusetts inspectors also performed important functions in safeguarding the health of employees in industrial establishments; but, by an act of 1912, these functions were transferred to the newly created state board of labor and industries. In New York the state health commissioner is authorized to employ public health nurses and assign them from time to time to the sanitary districts to aid in the control of communicable diseases. Many other states also have a number of inspectors in the field, assigned to special work in any part of the state where they may be needed. Usually, however, appropriations are insufficient to maintain an adequate field force.

Divisions and Bureaus.—The tendency is towards a more elaborate interior organization of the state department of health. Recent advances in preventive medicine are opening up new lines of public health work. This fact, combined with

increased appropriations, greater general interest in public health matters and the growing need for greater state control over such matters, has led to an extension of the work of the state department into new fields, and the resulting necessity of organizing the work into divisions and bureaus.

For example, the Pennsylvania state department is organized into a bureau of vital statistics, and divisions of sanitary engineering, laboratories, biological products, tuberculosis sanatoria and dispensaries. In addition, there are divisions for the distribution of supplies, and for purchasing, auditing and accounting. Each of these divisions is in charge of a chief, and some of them are still further subdivided. Likewise, in Maryland, there are the following bureaus: communicable diseases, vital statistics, sanitary engineering, bacteriology, and chemistry, and a division of food and drugs.

The administration of public health in New York was reorganized as a result of the report of Governor Sulzer's commission on the subject, appointed early in 1913, and a new comprehensive law on the subject was enacted as a result of the report of the commission, which went into effect on January 1, 1914.

A public health council is created, consisting of the commissioner of health and six members appointed by the governor, of whom at least three shall be physicians and one a sanitary expert. The council has no executive, administrative, or appointive powers but may enact and from time to time amend a sanitary code to apply to the whole state, with the exception of New York City. The department of health is divided into ten divisions or bureaus. These bureaus are: (1) administration, (2) sanitary engineering, (3) laboratories and research, (4) communicable diseases, (5) vital statistics, (6) publicity, (7) education, (8) child hygiene, (9) public health nursing, and (10) tuberculosis. Each division is under the management of a director appointed by the state

commissioner. The commissioner may also create other divisions from time to time.

The commissioner of health is charged with the enforcement of the public health law and the sanitary code, and exercises general supervision over local health authorities. He is further authorized to divide the state from time to time into twenty or more sanitary districts, and to appoint for each district a sanitary inspector or supervisor, who must be a physician. These sanitary supervisors are charged with the duties of conducting annual sanitary surveys of their districts, organizing district conferences of health officers, adjusting questions of jurisdiction arising between local health officers, studying causes of excessive mortality from any disease, promoting the registration of births and deaths, and enforcing the sanitary code.

The commissioner of health is given authority to employ public health nurses and to assign them from time to time to sanitary districts to assist the district supervisors and local health officers in the control of communicable diseases. He is also directed to submit to city authorities recommendations for the establishment of hospitals for contagious diseases, and to inspect all such hospitals. If any town board or village board of trustees fails to appoint a health officer, the state commissioner of health may exercise the powers of a health officer in that locality, the expense incurred by the commissioner being a charge upon the locality. The commissioner is further given power to investigate the enforcement of the tenement house law in all cities of the state.

POWERS AND DUTIES

Methods of Classification.—The powers and duties of state boards of health may be classified in different ways, according to several different standards of classification. In the first place, they may be classified as indirect or supervisory and direct. Until the middle of the nineteenth century, public

health administration was largely decentralized. All measures connected with public health administration were carried out by local authorities, either general or special, and at present many important powers and duties of this character are still in the hands of the local authorities. The gradual increase in the powers of the state boards has been brought about in part by the supervision of the state boards over the performance by local authorities of the duties imposed upon them. Thus with regard to the abatement of nuisances of a local character, the local authorities are usually competent to act, subject to the supervision of the state board. Indirect administration by the state board may, however, develop into direct, as where, if the local authority fails to act or performs its duties in a negligent manner, the state board may step in and carry out directly measures for the promotion of the public health. On the other hand, where the function is one which local authorities are not competent to perform, the state board may act directly in the first place, without waiting for local action.

Another classification of the powers and duties of state boards of health may be made in accordance with the method or character of the action taken into legislative, judicial and executive or administrative. Of these three classes of powers, the first and second are more generally lodged in the board itself, while the third is usually placed in the hands of the executive officer of the board. The legislative power consists in the adoption of sanitary regulations. Such regulations must not, of course, be in conflict with the Constitution or statutes. Even where there is no conflict, the exercise of this power by administrative bodies has sometimes been declared unconstitutional by the courts on the grounds that it is a delegation of legislative power and violates the principle of separation of powers. These decisions, however, have not seemingly checked the practice of legislatures to confer such powers upon boards of health. In some states

practically all public health regulations are issued by the boards, but there is apparently a tendency toward the embodiment in statutes of most of the regulations issued by the boards. The power of issuing regulations, where it exists, may be either special or general, that is, they may relate to certain special matters, such as quarantine or the protection of water supplies, or they may relate to the general protection of the public health. The public health council of New York State, for example, is empowered, "by the affirmative vote of a majority of its members to establish and from time to time amend a sanitary code." This code "may deal with any matter affecting the security of life or health or the preservation and improvement of public health in the State of New York."

Powers somewhat analogous to those exercised by the regular courts also sometimes devolve upon state boards. The determination as to whether particular conditions constitute a prohibited menace to the public health, or the interpretation of a given provision of the sanitary code are matters which may come for settlement either before the state board or its executive officer. In arriving at a decision in such matters the board may issue warrants of arrest, summon witnesses, take testimony under oath, and perform other judicial functions. The New York Act provides that the "actions, proceedings and authority of the state health department in enforcing the provisions of the public health law and sanitary code, applying them to specific cases, shall at all times be regarded as in their nature judicial, and shall be treated as *prima facie* just and legal."

The bulk of the powers of state departments of health are, however, of an executive or administrative character. They may be called the residuary powers, including all powers that cannot be classed as either legislative or judicial. They embrace most of the important special measures taken for the promotion of the public health, such as the establish-

ment of quarantine, the abatement of nuisances and the inspection of public buildings and other places liable to breed disease.

A third method of classifying the powers and duties of state health departments may be made in accordance with the nature of the power exercised or the character of the objects affected by such exercise rather than with the method of its exercise. From this standpoint, the powers and duties of the state health authorities may be classed as relating to: (1) the collection and dissemination of information on public health matters, (2) the examination and licensing of certain classes of practitioners, and (3) taking measures directly for the prevention or eradication of disease.

Information and Research.—The collection and dissemination of information was originally the primary and almost sole function for which state boards of health were established. In order that the information given out might be as authentic and accurate as possible, it was necessary that vital statistics should be collected and that various works of investigation and research should be carried on.

The object of collecting vital statistics has been described as being "to give warning of the undue increase of disease or death that is presumed to be due to preventable cause, and also to indicate the localities in which sanitary effort is most desirable and most likely to be of use." This object cannot be attained without full and accurate statistics, uniform with respect to different localities, and running continuously over a considerable period of time. In order that such statistics may be even approximately obtained, the efforts of local authorities have proved almost invariably ineffective, and state action is therefore necessary. In some respects even national control seems preferable. In view of the ineffectiveness of local action, practically all the states have established some degree of central control. This has taken two main forms. The earlier and more usual form has been

the collection of such statistics through the coöperation of state with local officials. The executive officer of the state board is usually designated state registrar of vital statistics, though sometimes a special state officer is appointed for that purpose, while the local health officers are *ex officio* local registrars of vital statistics. Physicians, midwives, and undertakers are required to report cases to the local registrars, who transmit them to the state registrar. In order to secure uniformity, the forms upon which reports are to be made are usually prescribed by the state board. Local registrars who neglect properly to perform their duties are sometimes, as in Maryland, subject to removal by the state registrar. The second form of control by the state over the collection of vital statistics is more centralized. In this form, which may be found in Pennsylvania, the services of locally selected officers are dispensed with, and the so-called local registrars are appointed by the central authority. Centralized control has undoubtedly had the effect of increasing the fullness, accuracy and uniformity of the vital statistics collected, but the tendency has not yet gone far enough, so that as yet many states are not included in the registration area of the United States Census Bureau.

Another important class of information collected is that regarding the causes of diseases and the means of their prevention. For this purpose, various states have established chemical and bacteriological laboratories. The work of the Massachusetts State Board along these lines has been especially noteworthy. Laboratories are also established for the preparation for free distribution of diphtheria antitoxin, smallpox and anti-typhoid vaccine and other prophylactic agents.

Since the successful application of sanitary measures depends in large degree upon the coöperation of the mass of the people, the education of the people in health matters should be one of the essential objects of the activity of state

boards of health. The importance of this was recognized in New York, as has been seen, through the creation in the state department of health of a special division of publicity and education. In only a few states are the appropriations sufficiently large to enable the state department of health to reach the people in an adequate manner. In most states, however, the amount of money spent on publications might be used to better advantage than at present. In addition to the annual or biennial reports to the governor or legislature, many state departments of health also issue bulletins at stated intervals, which are distributed among local health officers, physicians, and others who may apply for them. Too frequently they are composed for the most part of undigested statistics, which even health officers cannot find very serviceable. They fail utterly in even reaching the general public. Some of the more advanced states, however, have begun to issue bulletins of a popular character and have endeavored to distribute them among the people as widely as the funds at their disposal may permit. The difficulty is that the very people who are most in need of the information contained in such bulletins are the hardest to reach and the least likely to avail themselves voluntarily of these means of education. In order to meet this difficulty, beginnings have been made in some states towards educating school children in public health matters by definite instruction and placing suitable literature in their hands. Older persons as well are being reached by public health exhibits and widespread newspaper campaigns.

Examining and Licensing Functions.—The second division of powers and duties of state boards of health is that connected with the examination and licensing of various classes of practitioners. Among such practitioners whose work has more or less to do with the public health are physicians, osteopaths, dentists, optometrists, pharmacists, nurses, embalmers, barbers, midwives, and plumbers. In some states

the examination and licensing of these practitioners are intrusted entirely to special state examining boards which are usually quite separate and distinct from the state board of health. These special boards are in New York appointed by the state board of regents but in other states are usually appointed by the governor and senate. The state board of health is in a number of states charged with the examination and admission of persons to some professions. In Illinois, for example, the state board of health examines and licenses physicians, midwives, and embalmers, while the last named class of practitioners are examined by the state board of health in Wisconsin, Michigan, Minnesota and a few other states. In about a dozen states, the state board of health is authorized to examine and license persons desiring to practice medicine, while in a number of states the state board of health has similar authority with respect to one or two others of the classes of practitioners mentioned.

The functions of examining and licensing frequently involve the exercise of other powers, such as that of setting up standards of instruction and reputability for schools and colleges which undertake to prepare persons for entrance into the professions. Furthermore, the power to examine and license sometimes carries with it the function of regulating the practice of the profession in question. Regulations issued for this purpose by special state boards, such as the barbers' examining board, are occasionally subject to approval by the state board of health. Licenses to practice, granted either by the state board of health or by the special examining boards, are usually liable to be revoked for cause by the granting authority, subject to an appeal to the courts from the decision of the board. It would seem that the functions of examining and licensing are not sufficiently closely related to the ordinary work of the state board of health to include them within its active functions. The exercise of these functions with respect to professions closely related to the public

health might be better placed in the hands of a single examining board; or, as is now the practice in some states, the examinations might be conducted by a special board or boards, while the licenses are issued by the state health commissioner.[3] The multiplication of independent boards for each class of practitioners or trade should be discouraged.

Prevention of Disease.—The third division of powers and duties of state departments of health is that of taking measures directly for the prevention or eradication of disease, especially in epidemic form, and, in general, for the promotion of the public health. In as far as these objects are secured, the effect is brought about through the control of communicable diseases. With respect to any particular state or community, such diseases may arise in two ways: either through introduction from other states or communities, or through the existence of unsanitary conditions within the state or community. Hence, in order to control communicable diseases, action must be taken both to prevent their introduction from outside and to eradicate disease breeding conditions within. To secure the first of these objects the most usual measure is the establishment of quarantine. This was earliest developed, of course, in the seaboard states, but in some of these states, the control of maritime quarantine has now been taken over by the United States Government. The power of establishing quarantine was at first freely exercised by local units within a state against each other, but the abuses which arose from this practice have brought about an increasing degree of state control, either through direct administration by state officers, or through effective state supervision over local quarantine authorities.

The second method of controlling communicable diseases, viz.: through the suppression of unsanitary conditions within the state, has now become the more important of the two and

[3] This plan is similar to that recommended by the Minnesota Commission on Efficiency and Economy.

now requires the greater part of the energy of state health departments. Among the measures taken with this object in view are many which have already been mentioned and also a number of others, such as the abatement of nuisances, the inspection of food, drugs, milk and water supplies, and supervision of sanitary conditions in hotels, tenements, lodging houses, slaughter houses and other places liable to breed disease. Here, also, many of these measures were formerly left for the most part to be attended to, if at all, by the local authorities, but an increasing degree of state control is manifest. Some of these functions, such as the control of milk and water supplies, are of such a character that local authorities do not have sufficient jurisdiction to exercise them adequately, and, in such cases, the tendency towards state control is even more evident. Some of these matters are attended to, not by the state board of health, but by some special state agency, such as the Illinois State Water Survey and the Iowa State Board of Dairy Commissioners. In some states the state board of health is authorized to inspect factories, but in most states this function is placed in the hands of a special state officer or department. The division of authority between the state board of health and such special agencies is not always clearly defined, and conflicts sometimes arise between them, as well as between the state and local authorities. For the performance of these important functions, numerous inspectors are, of course, necessary, but in most states the funds at the disposal of the state health authorities are not sufficient to maintain a sufficient force of inspectors in the field.

Relations Between State and Local Authorities.—Previous to the middle of the nineteenth century, public health administration was considered a matter for the most part properly left to the control of the local authorities. So long as this system proved fairly satisfactory there was no considerable demand for state action, except, perhaps, in the matter of

maritime quarantine. The growth of population in congested centers, however, combined with the inefficiency of local authorities in meeting the needs of new conditions, seemed to call for some form of centralized control. This was especially true during the outbreak of epidemics, which occasionally brought about some form of state control. State action under these circumstances was, however, naturally spasmodic in character. When the danger became less apparent, the laxness of local autonomy ensued. Gradually, however, the realization of the need for continuous control of public health regulations by the authority best qualified to exercise such control in an efficient manner has led to various forms of state interference. Legislative interference in matters of local concern has often been very extensive, but state administrative supervision is tending gradually to displace direct legislative interference.

The first form of central administrative control was based on Mill's idea of the centralization of information. Research and investigational work of a scientific character, when conducted on a considerable scale, can usually be better carried on by the central authorities than by the local units of government. When thus carried on, the results of such work can also be made available more economically to scattered health officers in the localities. We find, therefore, that the first state boards of health were originally established primarily for the purpose of collecting the best available information on health matters and of acting as a center for the distribution to the localities of advice based upon such information. For example, the Massachusetts and New York state boards of health, when first established, were, with regard to local authorities, purely advisory bodies. Bringing pressure to bear upon local bodies by means of publicly given advice is, in fact, even yet an important function and in some cases the most important function of many state boards with regard to the local bodies. In most instances, the ad-

vice thus given is not directly enforceable, and undoubtedly often ignored by the local authorities, but it nevertheless has considerable influence. The information and advice issued consist in giving instructions to local health officers as to their duties, distributing compilations of public health laws, and recommending model sanitary ordinances and regulations for adoption by local bodies.

In addition to the diffusion of information and advice by the state authorities other ways in which the state and local authorities come into relation with each other may be summarized as follows:

Reports by local officers.
State aid to local bodies.
Division of state into districts and appointment by state authority of district inspectors of local health matters.
Appointment of local health officers.
Removal of local health officers.
Approval by state authorities necessary to validate local action or reversal of local action by state authorities.
Assumption of local health administration by state authorities upon failure of local authorities to act.
Issuance by state authorities of rules and regulations controlling local authorities.
Decision by state authorities of questions of disputed jurisdiction between local authorities.
Requirement for the holding of state-wide conferences by local health officers.

Examples of these various relations may be briefly indicated.[4]

In addition to the reports of vital statistics, which, as has been shown, must be sent by the local health officers to the state registrar of vital statistics, it is also required in a num-

[4] Kerr and Moll, *Organization, Powers and Duties of Health Authorities*, p. 48.

ber of states that the state board of health be notified immediately of the appointment, name and address of local health officers. In the large majority of states, periodical or special reports regarding local health conditions are also required to be made by the local health authorities to the state board of health.

The method very much in vogue in England of granting financial aid by the state to local units of government in return for a measure of central control has not yet developed to any considerable extent in this country. In Minnesota state aid has been granted to at least one locality by the state board of health, in return for the privilege of nominating its health officer.

The recent development in some of the more advanced states, such as Massachusetts, New York and Pennsylvania, of dividing the state into sanitary districts and appointing state health inspectors in such districts has naturally had the effect of strengthening the central control over local health authorities. The state inspectors are paid sufficiently large salaries so that they can afford to devote their whole time to public health work, which is not the case with most local health officers. The local unit of health administration is usually too small to enable it financially to employ an expert, full time health officer, and the state sanitary inspectors therefore are valuable in supplementing the efforts of the local officers and in exercising an efficient supervision over them.

A more radical step than the appointment of state inspectors for sanitary districts is the appointment by central authority of the local health officers themselves. In Vermont, the state board appoints all of the local health officers. In Florida, where there is little purely local sanitary organization, local health matters are attended to by centrally appointed agents. In a number of states, a majority of the members of local boards of health are subject to appointment by the state board. A qualified control over local ap-

pointments is sometimes found. In New Jersey, the state board of health establishes qualifications of eligibility and conditions for appointment of health officers by local boards. In more than a dozen states the state board may appoint local health officers upon the failure of the proper authorities to do so.

The power of removal of local health officers is vested in the state board in more than a dozen states. The power is usually hedged about, however, with limitations. Some cause of removal must generally be specified, and, in some cases, the power of the state board is limited to the filing of charges against local officers. A power tantamount to that of removal is found in Alabama, where the State Medical Association may revoke for cause the charter of a county medical society (which acts as a county board of health).

The regulations adopted by local boards and officers must, in a number of states, including Connecticut (Washington and Ohio in the case of villages), be approved by the state board before going into effect. In general, any regulations made by local boards, even where not subject explicitly to approval by the state board, must not conflict with those of the state board. In some states, the approval of the state board is necessary to validate the action of the local authorities with regard to special matters, such as the adoption of methods of sewage disposal. We find also that in a few states, the power of the state board extends beyond the auxiliary function of approving regulations of the local authorities, and includes the power of modifying or reversing such regulations. The power of the state board of health to prescribe uniform blanks for reporting vital statistics is another form of local action subject to central approval, the only difference being that indication as to what the central authority will approve is in this case made before local action takes place.

The demand in many localities for home rule even in pub-

lic health matters is often strong enough to prevent the assumption by the state of direct coercive authority over the local authorities. But the lack of central control frequently leads to such laxness on the part of the local authorities as to constitute a serious menace to the maintenance of the public health. In such instances the demands for home rule on the one hand and for state control on the other are, in many states, harmonized by allowing the local authorities to act unmolested so long as they perform their duties in an efficient manner, but providing for the assumption of such duties by state authorities in case the local bodies fail to perform them or perform them in an inefficient manner.

In more than a dozen states, if local health officers are not appointed or neglect to perform their duties when appointed, the state board may proceed to exercise the necessary functions. The New York law, for example, provides that "if any local board of health shall fail to appoint a health officer, the state commissioner of health may, in such municipality, exercise the powers of a health officer thereof." In Illinois, whenever local boards of health or local authorities fail to enforce efficient measures for the suppression of contagious diseases, the state board of health may take such measures as seem necessary, and when local health authorities have established quarantine, the state board may modify or relax it, and, on the other hand, where the local authorities fail to establish quarantine, the state board may do so. In Illinois, and several other states, the state board may enforce its own rules in the localities when the local boards fail to do so.

When the state board of health finds occasion, through the laxness of local authorities, to take charge of public health administration in the localities, it is generally provided that the expenses incurred by the state board in so doing shall be a charge upon the locality. A peculiar provision is found in Maryland, where it is provided that if the state board of

health has reason to doubt the accuracy of the reports of any local registrar, it may take over the work of the local registrar for a period of three months. If, at the expiration of that time, the registration exceed by ten per cent the registration by the local registrar during corresponding months, then the expenses incurred become a charge upon the locality; otherwise they are borne by the state.

In these various ways public health administration in the localities has been brought under the administrative supervision of state authorities. The increase of central supervision has generally resulted in increased efficiency of public health administration, and has redounded to the advantage both of the localities and of the state as a whole. In Massachusetts, "while the powers of the state board have been enormously increased, it has not been at the expense of the importance of the local boards. The work of the state board has resulted in increased local activity; separate boards of health have been established where none previously existed, and inactive boards have become more efficient." [5] In New York there were "in 1880 less than fifty local boards of health in the entire state and they were inactive and inefficient. Within two years, as a result of the work of the state board of health, a thousand local boards had been organized." [6]

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CHAPTER XV

THE ENFORCEMENT OF STATE LAW

A function of every state which is fundamental and all-pervasive, in that its exercise is practically essential to the efficient and adequate performance of almost every other function, is that of enforcing its own laws. Moreover, the problem of law enforcement in the American states becomes continually more acute and pressing on account of the constantly increasing number of laws to be enforced. The growth of civilization and the increasing complexities of modern conditions invite the constant growth of statute law enacted to regulate such conditions. The assumption by the state of any new function ordinarily involves the enactment of a law embodying the policy to be pursued and indicating the means to be utilized in carrying such policy into effect. Scarcely a legislature meets that laws are not passed embodying the assumption by the state of some new function, whether repressive or developmental in character, while old laws are constantly being amended. The importance of a law varies, of course, in accordance with the importance of the policy which it embodies; and as laws vary in importance, so the importance of their enforcement varies correspondingly, though not always in exact proportion to the intrinsic importance of the law itself. Irrespective of the importance or triviality of particular laws, the enforcement of the mass of state law is a general state function of the first importance. The maintenance of law and order, the repression of crime and the preservation of peace within the state are necessary conditions of social well-being, and no state which is hope-

lessly unable to perform these elementary functions can be considered a satisfactory type of organization for the performance of the higher developmental functions.

If we define law as the set of rules of human conduct which are enforced by the courts or by a determinate political authority,[1] then many so-called laws on the statute books of the states are not in reality laws. Since they are not laws in this sense, it may be said that, with respect to them, lawlessness or disrespect of law would be impossible. But this would be tantamount to reasoning in a circle, and, for our purpose, we may consider the term law to include all valid provisions of constitutions and statutes and all valid ordinances, rules, regulations, and decisions issued by competent political authorities. Law in this sense, as found in the American states, is enforced strictly, laxly or not at all, varying with numerous concomitant circumstances and conditions. Such circumstances and conditions consist of the forces which influence the formulation of law and the machinery which makes it, the character of the legislative product, the working of the machinery provided for the enforcement of the law, and the nature of the objects or conditions upon which the law is designed to operate. As these different factors are found to be favorable or unfavorable in varying degrees, so in similar measure will the law be more or less fully enforced. An adequate discussion of the problem of state law enforcement, therefore, would involve a consideration of such matters as the demands of public opinion and private interest for or against law enactment, methods of legislation as affecting the character of laws enacted, the organization and methods of courts of justice and of the various executive and administrative officers and authorities charged with the enforcement of law, and the direct influence of public opinion and private interest for or against efficient

[1] Cf. Holland, *Jurisprudence* (Eleventh ed.), p. 41; Dicey, *Law of the Constitution* (Seventh ed.), p. 23.

law enforcement. Some of these matters we need only briefly advert to at this place, while others may be more fully considered.

It is practically impossible, except in a Utopian community, that all law should be held in universal respect. Therefore, no matter what the condition of societies, as we know them at the present day, nor what the character of the machinery provided for the enforcement of law, there will always be more or less lawlessness, and a state can hope only to approximate more or less closely to full and complete enforcement. It is a generally recognized fact, however, borne out by statistics so far as they are available, that there is more lawlessness *per capita* in the United States than in any other country of an equal degree of civilization. No explanation of this phenomenon which attributes it to any single cause can be considered entirely adequate, and various causes for this situation have been and may be assigned.

In a democracy, laws should be the expression of the popular will, and, in a general sense, many laws are enacted as the result of what may be called the demands of public opinion. Other things being equal, the more a law reflects the demands of public opinion, the more apt it is to be enforced. In the United States, however, it is not always easy to ascertain what are the demands of public opinion. This is due, not to the lack of organs for the expression of public opinion, but rather to their multiplicity. On account of the lack of homogeneity in the population, there are many classes in the community whose interests are discordant, and it often results, therefore, that the demands of so-called public opinion are conflicting. No one of these classes may be clearly in the majority, and, although the action of political parties tends to reconcile differences and to clarify issues, these objects are not always fully attained. Moreover, the influence of different classes and interests upon the making of law is far from being measured in exact proportion to their ratio

to the total population. Public-spirited men and social workers have sometimes striven in vain to steer through the law-making bodies measures demanded by the most enlightened section of public opinion in the state and even by the most elementary dictates of reason and decency, such as laws providing necessary regulation of private banking or of the hours of labor for women. Their failure has in some measure been due to the fact that the legislative instrument with which they worked was not organized in such a way as to be amenable to influences striving for the promotion of mere public interests. Measures of undoubted benefit, the public need for which has been keenly realized, have been sidetracked, buried in graveyard committees, or amended until they bear no resemblance to their original form, while the wheels of legislative action have been greased for the speedy passage of pork-barrel legislation and of other bills desired by special interests, represented by powerful lobbies.

On the other hand, a small section of public opinion may, on account of superior organization and especially energetic propaganda, cajole the legislature into the passage of laws which may run counter to the predilections or prejudices of a majority of the people. Thus, although a law designed to fit the penalty to the criminal rather than to the crime may be based upon a desirable principle, nevertheless some communities may not yet be sufficiently advanced in the science of penology to support such a law wholeheartedly. The abolition of capital punishment might tend to increase lynchings because "to a considerable degree lynchings represent an attempt on the part of private citizens to inflict that punishment which in severity will be proportionate to the heinousness of the crime." [2] Even if the enactment of a law is desired by the majority of people in the community who have any opinion on the matter, it does not follow that the ma-

[2] J. E. Cutler, "Capital Punishment and Lynching," *Annals of the American Academy of Political and Social Science,* 1907, p. 182.

jority also desire to have it enforced. The extent of the demand for a law in a particular community does not usually correspond exactly to the extent of the willingness to obey that law in the same community. By the enactment of the law, the conscience of the community is frequently satisfied, and interest in its enforcement subsides. The community has gone on record as for or against a particular rule of conduct and the law is then left, as far as public opinion is concerned, to enforce itself. It is further to be noted that, even if, at the time of the enactment of the law, its enforcement was supported by an aroused public opinion, such support may not continue to manifest itself effectively, either through loss of interest in the subject on the part of the people or because of a change in the whole tone of public opinion brought about by the shifting of population, the growth of cities, and the influx of European immigrants. Under such circumstances a lax enforcement of the law is the natural consequence.

The non-enforcement of a law may be due to the ineffective manner in which it has been drawn up. Such a method of drawing up a law may be either intentional or unintentional. It sometimes happens that laws are purposely drawn with faulty or unconstitutional provisions in order that their enforcement may be difficult or impossible, because, though such laws are demanded by public opinion so strongly that the legislature feels it politic to at least seem to yield, nevertheless the law-making body is not in sympathy with the policy which such laws embody. Sentiment in the legislature opposed to the strict enforcement of the laws may not be sufficient to prevent the enactment of the laws but may be sufficient to "draw the teeth" from them by not providing, for example, adequate penalties for their violation, or additional penalties for repeated violations. The law-making body may thus itself connive at the violation of law by sowing the seeds of lawlessness in the law itself.

On the other hand, the ineffective character of a law may result from unintentional mistakes in drafting it. Under our system of government, the law-making authorities are, of course, largely separate from the authorities which execute the law. Whatever advantages may be deemed to result from this separation of powers, a disadvantage is that experience in the enforcement of laws is not adequately brought to bear upon their enactment. The legislature, lacking the benefit of such experience, may attempt to do by law what experience has shown cannot be accomplished by that method, or may place in the law provisions which it is practically impossible to carry out. The placing of detailed administrative provisions in an act, for example, may defeat its enforcement because the resulting rigidity does not allow necessary adaptation of the provisions to varying conditions. Greater effectiveness in the enforcement of the act could be attained if its provisions were made more flexible or general in character, and administrative authorities charged with its enforcement were empowered to formulate and apply supplementary rules and regulations.

The due enforcement of law is sometimes rendered difficult by the practice of declaring it to be in effect immediately upon its passage. Although, according to the legal maxim, ignorance of the law excuses no one, nevertheless, as a rule, the moral sense of the community does not support the immediate enforcement of laws without sufficient notice, especially when they undertake to render punishable acts which are merely *mala prohibita,* in so far as these can be distinguished from *mala in se.* It is said that, immediately upon the passage of the race track gambling act in New York, a sheriff, acting upon telegraphic information, arrested certain persons for violation of the act, and brought them for trial before a judge who was himself ignorant of the provisions of the law. In order to avoid difficulties of this sort, the constitutions of some states now provide that the laws

shall not go into effect immediately upon passage, except in the case of emergency measures.

Law as a whole is seldom, if ever, perfectly adapted to the conditions upon which it is intended to operate, but is at most only in a continual process of becoming so adapted. This situation arises in part from the necessary generality of the law so that, though it is adapted to many conditions upon which it operates, it is not adapted to all. It is due in part also to the comparative difficulty of changing the law so as to adjust it accurately to various stages in the momentary shifting of opinions or the steady evolution of conditions and ideals. This is particularly true of the common law and of constitutional law. The doctrine of *stare decisis* and the conservative bent of mind of judges and lawyers tend to withhold from the common law that flexibility necessary to its perfect adaptation to changing conditions. The whole common law doctrine of master and servant may be cited as a conspicuous example. With respect to constitutional law the difficulty of change, both in the case of the national constitution and in many of the states, is so great that not only in grave crises, such as that of the Civil War, but also in lesser emergencies, the constitution may be violated with the connivance of both the political and the judicial branches of the government. When the courts refuse under these circumstances to interpret the constitution in such a way as virtually to connive at its violation, their decisions may be either disregarded entirely or severely criticised and only laxly enforced. An opinion of the supreme court of Colorado advising the legislature of that state that a bill to weigh coal at the mines in order to fix the compensation of miners was unconstitutional was followed, it is said, by strikes and disorders due to attempts to secure by force what could not be secured by law.[3] In a country such as the United States, where the manifold conditions which determine the character

[3] *In re* House Bill 203, 21 Colo., 27.

of the body of law are constantly changing, the need for new laws is, of course, greater than in countries where conditions are more static and quiescent. Thus, there is in the United States a considerable need for new laws, but unfortunately the supply of laws greatly exceeds the real, if not the fictitious, demand. The multiplicity of laws is accentuated by the large number of jurisdictions and law-making bodies, and there is a great lack of uniformity of legislation among the various states. It frequently happens, moreover, that the laws as passed are conflicting and sometimes meaningless. Under these circumstances it can hardly be expected that the laws should generally be held in very high esteem. It thus happens that, since laws which are not generally respected will not as a rule be generally obeyed, the multiplicity of laws has a detrimental effect upon their enforcement. It results that, as has been said, there are in the United States "more laws and less law" than in any other country.

Disrespect for law and consequent difficulty in law enforcement may arise, not only from the character and multiplicity of laws but also from the character of the law-making body. That the state legislatures have fallen into sad disrepute is evidenced by the numerous constitutional limits placed upon their powers. Legislatures, moreover, have sometimes been alleged not to be truly representative of the people who have elected them. This may be due to the fact that the legislature has been corrupted by special interests, or it may arise from the fact that the system of apportionment of members among the various districts of the state is faulty. It is well known that large cities in some states are not accorded the representation in the legislature to which their population as compared with that of the rural districts would entitle them. Whether on account of legislative corruption or a faulty system of apportionment, many people may hold in disrespect a law in the making of which they consider themselves not to have been properly represented.

Difficulties in the enforcement of law may arise not only from the character of law and law-making, but also from the character, opinions, and interests of the people upon whom the law is intended to operate. Our constitutions and laws in their basic principles are for the most part designed to operate upon the people of a fairly homogeneous democracy, in which approximately the same ideals of government, liberty and law are generally held throughout the community. As a matter of fact, however, the population of our commonwealths by no means measures up to this standard. The millions of immigrants who have recently come to our shores from southern and southeastern Europe and the other millions of persons of African descent already here, form heterogeneous groups to whom Anglo-Saxon ideas of government, liberty, and law are for the most part strange and inapplicable. The attempt to apply the same code of conduct to such extraneous elements is not ordinarily very successful and frequent violations of the laws embodying such rules of conduct is the natural result.

Even if the populations of the various states were much more nearly homogeneous than they are and Anglo-Saxon ideas of government and liberty were nearly universally held, such ideas would probably not be especially conducive to the strict enforcement of law. The governor who, at a recent Conference of Governors, declared that "when mobs are no longer possible, liberty will be dead," might have cited the Boston Tea Party in support of his statement. The spirit of independence and of self-reliant individualism which have throughout our history been characteristic of the great majority of Americans, however noble may be deemed many of its manifestations, nevertheless tends to render them somewhat impatient of the restraints of law and inclined at times to take the law into their own hands. In a democracy where the people are at least theoretically sovereign, each citizen is apt to consider himself an aliquot portion of that sov-

ereignty with a sovereign right of dispensation with respect to whatever laws do not suit him. It may be said that there is a difference between disrespect for law in general and disrespect for particular laws; that the former shows a lawless spirit, while the latter is merely evidence of democratic independence. But the latter, if not checked, is apt to grow into the former, and it thus becomes difficult to distinguish clearly between these different manifestations of disrespect for law. Disregard of particular laws by prominent citizens in a community tends to encourage disrespect for law in general, among the mass of the people. In many communities public opinion in regard to law enforcement has become callous, and there is not, even among the so-called best citizens, a sufficient intolerance of lawlessness or a sufficient insistence upon the vigorous enforcement of the law. It is a truism that, in a government such as ours, a law is difficult to enforce unless it is supported by public opinion. It does not necessarily follow, however, that a law which is supported by public opinion will be strictly enforced. The majority of people in the community may be in favor of the enforcement of the law, but their support may be lukewarm, half-hearted, disorganized, so that the influence which they exert upon the question of law enforcement is comparatively small. On the other hand, a minority hostile to the enforcement of the law may exert a dominant influence upon the question of law enforcement because of more efficient organization and more direct interest in non-enforcement or lax enforcement.

When there is a conflict between public opinion and private interest over the matter of law enforcement, the latter is apt to have the better of it unless public opinion is more than usually powerful and persistent. The desire to amass wealth through carrying on an illegal business or by pursuing a line of conduct prohibited by law thus becomes one of the most potent causes of lawlessness. Whenever money can be made by conducting a business in violation of law, a possible fund

for the corruption of the law-enforcing officers immediately becomes available. The sale of liquor, commercialized vice and gambling are prohibited by law in many states, yet it is notorious that they exist in open defiance of the law in most of the large cities, and to some extent even in the towns. It is puerile to suppose that such businesses can be carried on on any large scale without the knowledge of the police. Their existence, therefore, must in large measure depend upon a willingness to divide the enormous profits of law-breaking with the police. If public opinion is sufficiently aroused against these businesses, they may be compelled for a time to take to cover, but a situation of this sort is usually temporary. On the other hand, there is a more permanent community of interest between the police and the law-breakers. The police do not wish to exterminate such illegal businesses, for such action would "kill the goose" which for them "lays the golden egg." The worst sort of an alliance is thus produced between those who desire to violate the laws and those whose duty it is to enforce them.

Unfortunately, the situation with respect to the enforcement of law against such illegal businesses is complicated by the operation of machine politics. "Of all political cements," as Benjamin Franklin long ago pointed out, "reciprocal interest is the strongest."[4] Where a profitable business is prohibited by law or a particular method of conducting such a business is so prohibited, but such business or method of conducting such business is not considered highly immoral by a considerable proportion of people in the community, an opportunity is opened for a mutual understanding between those who conduct or profit by such business and one or both of the political party machines. The party machines need money for success and in exchange for it as well as for support at the polls, they are sometimes prepared to reciprocate

[4] An Historical Review of the Constitution and Government of Pennsylvania (1759), p. 73.

such favors by granting special privileges to corporations, saloon keepers and others to carry on their businesses in an illegal manner. Laws making it illegal to carry on such businesses in a particular manner are sometimes enacted at the instance of a particular political party, ostensibly in compliance with popular demand, but in reality not for purposes of enforcement but for purposes of blackmail. In return for the privilege of violating such law, the law-breakers are expected to support the party with their votes and money contributions. If they begin to show signs of independence either in political allegiance or in refusing to pay blackmail the word is passed to the police and the law is promptly enforced against them. But such independence is seldom displayed, and thus, for the most part, graft and lawlessness go hand in hand. That this situation is inexcusable, if not inexplicable, is evident, for the payment of graft shows that the law can be enforced if the law-enforcing officers so desire, for otherwise it would not be paid.

The conditions described above are usually found only in those localities where there is no widespread, insistent and powerful demand of public opinion for the enforcement of law. This attitude upon the part of the public naturally influences the officials elected by the people of the locality and charged with the enforcement of the law, and conduces to laxity in criminal prosecutions. Not only in the case of the ordinary police force, but also in the case of all officers, such as sheriffs, prosecuting attorneys, justices of the peace, and various commissioners and inspectors, upon whose activity or non-activity the bringing of law-breakers to justice depends, an indifferent attitude upon the part of the public has an enervating effect, and if, to this circumstance, there be added the existence of individuals or corporations who are able and willing to pay for the privilege of evading the law, the possibility of corrupt connivance of officials at the violation of law is very great. The discretion of officials under these

circumstances is not always merely between action and non-action, but is also between efficient and lax action. Thus, justices of the peace sometimes let "bootleggers" go with a minimum fine even for a repeated offense, although the evidence of their guilt is apparently conclusive, while sheriffs sometimes raid places where liquor is being illegally sold but fail apparently on purpose to secure the kind of evidence which they must know is necessary for conviction.

Efficiency in the enforcement of the law is also influenced by the character of the organization and methods of the machinery provided for such enforcement. In the first instance, considerable dependence is placed for the enforcement of law upon private initiative. Although by constitution and statute various prosecuting officers are created and established both in the state and in the localities, nevertheless, in accordance with the theory of the English common law as embodied in many constitutions and statutes, much still depends, not only in civil but also in criminal cases, upon the industry and initiative of private individuals and associations. The law enacted in some states allowing an individual who has been injured in person or property by mob violence to bring suit for damages against the county, although in form a civil proceeding, is in reality the invocation of private initiative to cope indirectly with criminal lawlessness. Under the common law and many criminal codes any private person may arrest without warrant for a criminal offense committed or attempted in his presence. Although the constitutions and statutes which create executive, law-enforcing and prosecuting officers usually require or imply that they shall act upon their own initiative in the enforcement of law, nevertheless they frequently do not act even in the face of notorious lawlessness until goaded by threats of indictment or unless petitioned by private individuals or associations. Even when the alleged lawbreakers are arrested, under the provisions of the bill of rights giving persons accused of crime the right

to be confronted with the witnesses against them, the action of the aggrieved individuals in appearing in court and testifying against the prisoner is usually necessary to conviction. Private initiative in law enforcement is of wider scope, however, than that merely of the individuals directly aggrieved by acts of lawlessness. Under the famous Iowa Injunction and Abatement law, now copied into the statute law of a number of other states, if public officials are derelict in the performance of their duty to suppress disorderly houses, any citizen is authorized to maintain an action in equity to perpetually enjoin such places. Many laws relating to cruelty to children or to animals were not enforced until groups of private citizens came to the rescue with the organization of societies for the prevention of cruelty to children or to animals. Law and order leagues and vigilance committees have sometimes been organized with similar purposes and results. Lynch law in some of its manifestations is a form of private initiative in the enforcement of law, where the ordinary official machinery for its enforcement has broken down or is manifestly inefficient, though this method of law enforcement is, of course, at the same time a violation of law. The offer of rewards for information leading to the arrest and conviction of alleged criminals is an antiquated and amateurish method of bringing criminals to justice through invoking private aid and is a virtual admission of official incompetence to enforce the law without private assistance. The resort to such a method, moreover, is not apt to be effective where there is considerable hostile sentiment against the law, or where the lawbreakers are organized and unscrupulous. Such methods of law enforcement, while sometimes necessary under existing conditions, would be no longer justified if the government were sufficiently energetic and efficient in the enforcement of law. Private initiative in a democracy probably cannot and should not be entirely dispensed with in securing the enforcement of law. But its proper sphere of

operation consists not in taking the place of state action, but only in supplementing it in certain ways. Organized private agencies, for example, may be legitimately operated for the purpose of keeping public opinion aroused upon the question of law enforcement, and for the purpose of employing permanent experts qualified to keep in touch with the situation and to aid, suggest lines of action to, and even to prod the officials charged with the enforcement of law. Private agencies performing such functions are especially valuable in communities where the law enforcing officers are elected for short terms and have little opportunity of becoming expert in the performance of their duties.

Even in a democracy, however, much the greater share of the dependence for law enforcement must, of course, be laid upon the official agencies charged by law with that duty. It becomes necessary, therefore, to inquire to what extent the character, organization and methods of the official machinery provided for law enforcement in the states are adapted to that end. Democratic governments do not, as a rule, have as much force behind them as do monarchies and aristocracies. This is particularly true in a democracy constructed upon the principle of checks and balances and separation of powers. To the extent that powers are separated and divided among the various authorities of the government, to that extent is each authority weakened in the enforcement of the law intrusted to its care. The machinery provided for the enforcement of state law consists of various executive, administrative and judicial authorities, more or less separate and distinct, including the state militia, the courts, the governor, state or local commissioners and inspectors, the attorney-general, the local prosecuting attorneys, sheriffs, mayors, constables, marshals, police and the *posse comitatus*. In addition, the enforcement of state law may be affected by the action of the Federal courts, officers, and armed forces. The number of authorities charged with the enforcement of law renders

such enforcement complicated and difficult, especially since there is no central controlling authority over them. The comparative independence of the various law-enforcing agencies each to the other and the degree of uncontrolled discretion allowed to each frequently renders coöperation between them strained and unnatural. Such coöperation, however, is essential to efficient law enforcement, for the process of bringing law-breakers to justice or of preventing threatened infractions of the law usually consists of various steps or stages, into each of which the powers and activities of more or less separate agencies or sets of agencies enter as the decisive factor. Thus, the process of enforcing the law by punishing violators of it consists, first, of the actual physical arrest of the offenders by the police, sheriff or other officer, the prosecution of the offenders in court by the public prosecuting officers charged with that duty, the verdict of the jury and sentence by the court, and the execution of that sentence by the sheriff or other executive officer of the court. The vindication of the law, therefore, consists of a chain composed of several links, and the chain is no stronger than the weakest link. The failure of justice may result from dereliction of duty on the part of any officer or set of officers composing one of the links of the chain. Some control, it is true, may be exercised by one set of authorities over another, as, for example, an executive officer of a court who failed or refused to execute the sentence of the court would be liable to punishment for contempt of court (although without the assistance of other executive officers the court would be powerless to punish for contempt), and to a slight extent a common supervisory control over sheriffs and prosecuting officers may be exercised by the governor through his power of removal, while, in extreme cases, the legislative power of impeachment may be invoked. The main reliance, however, for securing coöperation among the various law-enforcing officers and the proper performance by each of his duties is placed upon the

fact that each officer is subject to the law, which prescribes, sometimes minutely, his duties. There is thus in the states no administrative department of justice, but merely a congeries of more or less separate officers, charged by law with certain duties connected with one phase or another of law enforcement. It is natural that, under these conditions, effective coöperation between the various officers and authorities is not always to be found. This lack of coöperation may be either negative or positive. Thus, the courts may be ready to convict, but the police officers may fail to arrest or prosecuting attorneys may either fail to prosecute or may enter a *nolle prosequi* even where the guilt of the accused is evident. On the other hand, actual conflict may take place between the various law-enforcing officers, either for partisan political reasons, or because of at least ostensible differences in the interpretation of the law. Thus, conflicts may arise with respect to the enforcement of anti-liquor or anti-vice laws between the law-enforcing officers of a county and those of a city located within the county, as well as between state and local officers. Not infrequently the enforcement of various state laws by state boards or other executive authorities is enjoined, at least temporarily, by local courts, even though there can be little doubt as to their constitutionality. Thus, internal conflict arises between the various law-enforcing authorities, and the result is lack of coöperation, dissipation of energy and the frequent evasion of the law by those who should be brought to justice. When this result takes place, the people do not usually know whom to hold responsible, for the force of public sentiment, instead of flowing full and strong in one effective channel, is rendered ineffective through dissipation among many channels. The separation of powers places, in ordinary times, too great a task upon public opinion for it to perform. The political party may sometimes bind together the various law-enforcing authorities with a common purpose and interest, but, unfor-

tunately, this common purpose may be the nullification of the law. State control of the sale of impure food, for example, or of the illegal operations of trusts, through criminal prosecution of the violators of its pure food or anti-trust laws, may be rendered weak and ineffective through the underlying community of interest between the party machine, which nominates and practically elects the officers charged with the duty of bringing such prosecutions and the wealthy and powerful persons or corporations who do not desire to have these laws strictly enforced.

The system of placing each law-enforcing officer and authority under separate legislative control rather than organizing them into a close-knit administrative department results in a lax and ineffective enforcement of the law. The legal theory upon which this system of legislative control is based is thus stated by Chancellor Kent: "When laws are duly made and promulgated, they only remain to be enforced. No discretion (on that point) is submitted to the executive officer." [5] This idea is also involved in the provision found in about fifteen state constitutions to the effect that laws shall not or ought not to be suspended except by legislative action.[6] Thus, in pursuance of authority vested in him by statute, the governor may issue a proclamation exempting certain counties from the operation of the law against carrying deadly weapons.[7] Further than the legislature authorizes, however, the power of suspending laws is not deemed, in legal theory, to extend. As a matter of fact, however, the power of virtually suspending laws is at one time or another exercised by practically every officer or authority charged with the enforcement of the laws. A recent conspicuous example occurred in Missouri, where the insurance companies threatened to cease

[5] *Commentaries*, i, p. 271.

[6] See, for example, Constitution of Virginia, Art. 1, Sect. 7; Constitution of Massachusetts, i, 20.

[7] State *vs.* Clayton, 43 Texas, 410.

doing business in the state as the result of the passage of what they considered to be a harsh insurance law. In this emergency the governor and attorney-general conferred together and agreed to consider the obnoxious law unconstitutional, and to refuse to enforce the law on that ground. Thus, the law was practically suspended, though there had been no decision of a court declaring it unconstitutional. The power of the governor to suspend the operation of the laws under certain circumstances has been recognized by the Supreme Court of West Virginia, which has held that, before the governor executes a law, he must of necessity decide whether it is constitutional and valid or not. If, in accordance with the decision of the appellate court on a similar, but not the same, law, he decides that a certain portion of a tax law is unconstitutional and directs the state auditor to instruct the assessors to disregard it, his decision is valid to the extent of being binding upon auditor and assessors.[8]

The doctrine or practice of executive dispensation has ordinarily found little favor. It has been said that "to permit an executive officer conclusively to determine for himself upon the validity, propriety and effect of a law, and regulate its enforcement accordingly, would be to permit arbitrary and despotic power to assert its sway, no matter what may be the form of government."[9] This may be largely true, and yet the exercise by executive officers of the power of suspending laws may occasionally not be without some color of justification. The executive should not be a mere "tool in the legislative hand," for the exercise of wise discretion is often an essential condition of sound administration. Laws, however, frequently undertake to limit the discretion of the enforcing authorities by prescribing definitely and in detail the precise method of administrative enforcement without

[8] State vs. Buchanan, 24 W. Va. 362 (1884).

[9] C. C. Bonney, "The Executive Power and the Enforcement of the Laws," *Lend a Hand,* vi, p. 9.

regard to variations in time, circumstance and condition. The color of justification for suspending the law, at least in part, may therefore arise from the undue rigidity and unwarranted minuteness of the administrative provisions in the law. This is not an argument for the non-enforcement of law, but rather for the better construction of the laws to be enforced. "No statute, save one designed to operate only on some immediate and specified subject matter, can be drafted with full foresight of the instances in which its provisions will be applicable and of the possible circumstances which may render its requirements inadvisable. It is therefore often highly expedient to vest in some administrative authority a discretion as to its enforcement. As a matter of political fact, where no individual may claim such enforcement as a private right, such discretion usually exists, for the executive may fail to enforce the law, however mandatory its requirements." [10]

The exercise by local officers and authorities of the power to suspend state laws may take on a color of justification on the ground that it affords a measure of home rule and local self-government to an extent which is denied under the terms of the existing law. From the standpoint of legal doctrine, the state has the right and power to determine the measure of home rule to which the localities shall be entitled. But from the standpoint of public policy and expediency, it may be questioned whether this doctrine is sound in all cases. There may be cases where it is for the best interests and welfare not only of the locality in question but also of the state as a whole that such locality enjoy a larger measure of home rule than the law, as it stands, allows. If the locality is powerless to obtain an alteration of the law, then, it may, with some show of justification, secure the same end by virtually suspending the operation of the law

[10] T. R. Powell, The Separation of Powers, *Political Science Quarterly*, xxvii, p. 222.

within its jurisdiction. This is rendered possible on account of the existence of the system of legislative centralization and administrative decentralization which still largely obtains in the states. Whatever justification there may be, however, for the exercise by the localities of the power to suspend laws with respect to purely local matters, there is no justification for the exercise of this power with respect to laws the enforcement of which is of concern to the whole state. It may not always be easy to draw a sharp line between purely local matters and those of state-wide concern, but about many matters there can be little doubt. Thus, the whole state is interested in the prevention or suppression of crimes against the public health and in the bringing to justice of persons guilty of infamous crimes; with respect to such matters, no locality can erect a wall around its boundaries and live wholly unto itself.

The localities within a state have, however, frequently exercised a dispensing power with respect to the enforcement of state laws dealing not only with local matters but also with those of state concern. This defiance of state law sometimes takes the form of positive action in violation of it. The city of Denver, for example, adopted an amendment to its home rule charter, purporting to give the city the right to regulate the sale of intoxicating liquors and to sell liquor licenses extending beyond the date when the state prohibition law was scheduled to take effect.[11] The people of Springfield, Illinois, on a referendum vote which was permitted to get on the ballots in 1912, formally voted that the state Sunday closing law should not be enforced. What virtually amounts to a referendum on the question of the enforcement of this law has been afforded in practically every recent mayoral campaign in the city of Chicago, for candidates have

[11] This charter provision was held null and void. Cf. Davis *vs.* Holland, 168 S. W., 11, where it was held that authority cannot be conferred upon a city to suspend state laws.

run upon a platform of non-enforcement of this law, and apparently no candidate has had much chance of election who did not virtually pledge himself to disregard this law if elected. A former mayor of Chicago recently made the public statement that during more than twenty years while he and his father occupied the mayoral chair of Chicago, they had both construed the Sunday closing law in that city as a dead letter, believing that their attitude represented the majority sentiment of the community. Practically, therefore, the state law was nullified and an illegal or extra-legal form of local option or veto power was afforded the city with respect to this law. The Chicago City Council has at times passed ordinances which virtually fly in the face of the state law by requiring applicants for saloon licenses to accept conditions with which they could not comply without violating the state law. When the states undertook to nullify Federal law, the very existence of the Union was threatened, and the practical nullification of state law by the localities brings the state face to face with a similar problem. It may even be questioned whether a state whose law is systematically nullified and whose will is set at naught by the erection within its borders of municipalities practically independent, within certain spheres, is maintaining a republican form of government, as required by the Federal Constitution.

The nullification of state law in the localities is rendered possible by the system whereby the state depends for the enforcement of its law upon local officers who are elected by the people of the locality and are subject to no effective state control. Under this system the state law is not apt to be strictly enforced or perhaps not at all, unless enforcement is favored by the public sentiment of the community which controls the agents of enforcement. A system of centralized enactment of law combined with decentralized enforcement must, almost of necessity, fail to secure a uniform enforcement of the law throughout the state, because the

law as enacted reflects, at least theoretically, the common standard represented by the average opinion of the whole state, while its enforcement is subjected to the varying standards represented by the varying local sentiment in different sections of the state.

The will of the majority of the people of the state presumably expressed in the law is thus frequently thwarted and set at naught. The prevalent non-enforcement of state law in the localities is largely due to the fact that the diffusion and disintegration of executive power deprives state-wide public opinion of any adequate facilities for the control of executive policy. Adverse local sentiment and the malign influence of party managers cause petty executive officers to interpret the state will to suit their own purposes, and in many instances the latter actually control the determination of public policy within the range of their official activity or possible lax or non-activity. State prohibition and excise laws remain unenforced because upon the officers charged with their enforcement there rests no continuous pressure of responsibility to the general public capable of being applied by the central administrative authority. State election laws will doubtless continue to be violated and wholesale election frauds to be connived at under a system in which a community of interest exists between the party managers and their appointees, the sheriffs, and in which the latter officers in turn practically control the selection of the grand juries.

Of many startling examples of the disregard of law due at least in part to the disintegration of the state administrative system, the so-called "tobacco war" in Kentucky may be cited as an example. "In December, 1905, in Todd County, in the circuit court room, packed by excited men, a lawyer declared that if they (the night riders) did violate the law they ought not to be punished, and would not be prosecuted while he was commonwealth's attorney, and the very next night one tobacco factory was burned and another set on fire, and the

following Monday night a large band of armed and masked men held up a railroad train and searched it for tobacco and dynamited a snuff factory, and although the circuit court was in session, with a grand jury empaneled, no one was indicted or punished." [12]

Local officers and even judges were in sympathy with the night riders and the law was powerless to punish the guilty since witnesses dared not testify, grand juries would not indict, and petit juries refused to convict. It is significant that the judges and state's attorneys were elected by the people of the localities and not subject to removal or correction by the governor. In legal theory, sheriffs, state's attorneys and police are state officers, acting as the agents of the state in their localities,[13] but for practical purposes they are local officers, because subject, in the main, to local control only. Other things being equal, each local officer enforces the law, or fails to do so, in accordance with whichever course of action will best further his political interests. The sentiment of those who control his tenure of office or his rise to a higher office is naturally a determining factor, unless, indeed, present inducements exceed future prospects in his estimation. Those who bewail the prevalent disregard of law and attribute all lawlessness to the pusillanimity of sheriffs, state's attorneys and grand juries may well consider whether this condition of affairs is not due rather to the system of nominal popular election of local executive officers who are thus actually placed under the control of sinister unofficial influences, and to the consequent lack of general popular control over them which might otherwise be exercised through the effective administrative supervision of the state executive authority.

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[12] Message of Gov. Willson of Kentucky to Legislature of that State, Jan., 1908, quoted in *Reports of American Bar Association,* xxxiv, p. 416.

[13] Chicago *vs.* Wright, 69 Ill., 326.

In order to remedy this condition of affairs, whereby the localities set at naught the will of the state as expressed in state law, comparatively little has been done, but various measures have been proposed and some of them put into effect. Such measures may be classified as legislative, judicial, and administrative. The legislative power of impeachment has been expressly extended by the constitutions of some states to local law-enforcing officers. Thus, the constitution of Alabama provides that a sheriff may be impeached "whenever any prisoner is taken from jail or from the custody of the sheriff or his deputy, and put to death or suffers grievous bodily harm, owing to the neglect, connivance, cowardice or other grave fault of such sheriff." [14] Whenever the governor of the state has used his influence to have this impeachment machinery brought into operation, the effect has been to decrease somewhat the number of lynchings in the state.

Although, in general, the mistakes of local courts may be corrected on appeal in the higher state courts, this method of controlling and correcting the action of local courts in acquitting violators of state criminal laws is impracticable on account of the constitutional limitation of double jeopardy.[15] In order to avoid this difficulty, laws have been enacted in some states, such as Ohio, Indiana, and South Carolina, providing that the county in which a riot or mob violence takes place shall be liable in damages to the person or his legal representative who has been injured in person or property by such mob. A New York law of 1855 provided that if a mayor or sheriff fails to provide proper means for the protection of private property against destruction by mob or riot, the person injured may bring suit for damages against either the county, city or derelict officer. Such laws do not seem, however, to

[14] Sect. 138.

[15] In some states, however, the state has a right of appeal when the verdict has gone for the prisoner on a point of law. Stimson, *Popular Law Making*, p. 343.

have been very effective in suppressing mobs and lynchings, for the persons who participate in such disorders are not usually those who pay the largest proportion of the county taxes, and even if so, the prospect of future increase in the tax rate would scarcely have much effect in quelling the passions of an angry mob.[16] In so far as lynchings are due to the fear that criminals may escape on account of the cumbrous and antiquated character of the judicial system, they may doubtless be lessened in frequency by an increase in the speed, efficiency and certainty of the administration of criminal justice. A method of control over local law-enforcing officers which combines both judicial and administrative procedure is found in some states. Thus, in Indiana and Nebraska, a local prosecuting attorney who is derelict in the performance of his duties may be ousted by the supreme court of the state as the result of *quo warranto* proceedings brought against him by the attorney-general. Under the so-called Cosson law, enacted in Iowa,[17] and copied in some other states, the attorney-general may bring an action in the district court to remove any county attorney, sheriff, mayor, police officer, marshal or constable, for willful or habitual neglect or refusal to enforce the law. "Under this law a few removals have been made, and in many more cases a threat of proceedings has stirred reluctant officials into activity." [18]

Legislative and judicial methods and even the combination of judicial and administrative procedure in bringing about a greater harmony between state law and its enforcement in the localities, however, are, on the whole, but makeshifts and halfway measures. Such measures have been enacted by lawmaking bodies which perceived the evils resulting from unrestrained local option in law enforcement, but which either

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[16] Cf. Cutler, *Lynch Law*, p. 254.

[17] Laws of 33rd General Assembly of Iowa, Ch. 78. See also South Dakota Session Laws, 1915, Ch. 268.

[18] *Journal of Criminal Law and Criminology*, iii, p. 927.

did not perceive the correct method of securing the enforcement of state law in the localities, or were so imbued with ideas of home rule and local self-government or with fear of arbitrary state power that they were unwilling to adopt it. That the correct solution of this difficulty must consist, at least in part, of greater administrative centralization in law enforcement was perceived and pointed out as early as 1821 by such men as Martin Van Buren and Rufus King in the New York Constitutional Convention of that year. Van Buren called attention to the fact that the want of proper administrative connection between the chief executive of the state and the local officers, such as justices of the peace and magistrates, through the agency of whom he must execute the laws, had produced endless difficulties, embarrassments, and lack of coöperation of the public officers during the late war (of 1812).[19] Rufus King was even more emphatic in his insistence upon central administrative control of local law-enforcing officers. "The sheriffs," he declared, "are ministerial officers directly connected with the supreme executive. *He* is responsible for the execution of the laws, and they are the agents and the instruments with which he is to execute them. How can he be responsible for the faithful performance of this important trust, if you deprive him of the only means by which he can execute it? As to executive offices, you must therefore reëmbody and re-unite them with the executive power, or destroy it by rendering it utterly incapable of performing its high functions. The sheriffs should be responsible to the executive and derive their authority from that source. . . . How can the governor be justly held responsible for the faithful execution of the laws, if he has no control over those by whom all processes, civil and criminal, are to be executed; who may command the power of the county and of the neighboring counties to their aid in case of resistance?

[19] *Proceedings and Debates of the New York Constitutional Convention of 1821*, p. 342.

Suppose a spirit of insubordination and discontent to exist in certain counties, which it was a part of the appropriate duty of the executive to repress and subdue: Would you furnish him beforehand with the excuse, that though he had the best disposition to perform his duty, you had deprived him of the means of doing it, by vesting in other hands the nomination of the agents through whom alone he could enforce obedience to the laws? Is it not risking the good order and harmony of society thus to weaken the responsibility of the executive? In order to secure this responsibility, the executive power must be united, consolidated, and connected in all its ramifications with the supreme government of the state." [20]

These words of wisdom uttered nearly a hundred years ago have borne comparatively little fruit in the formation of the actual relation between the commonwealth and its political subdivisions with respect to the enforcement of the laws, and the result is that scarcely a year passes that the people of some of the states do not awake with painful surprise to the fact that the state has laws upon its statute books which it is apparently unable to enforce in some of its counties and cities. "In the cities and their respective counties, where conditions have resulted in the election of officials to see that the law is not enforced, rather than to enforce it, the state is powerless to intervene in any way to prevent the dishonor of its laws." [21] State executive authorities are reduced to the necessity of humbly begging the local officers to do their sworn duty to enforce the state laws, but to such requests no greater heed than necessary is usually given. To repeal the laws which are being nullified would be to publish to the world the shame of the state's weakness. Hence the demand is for new laws, more detailed and stringent, to assist in the en-

[20] *Proceedings and Debates of the New York Constitutional Convention of 1821*, p. 387.

[21] Special Message of Gov. Hooper of Tennessee on the Four-Mile Law, 1913.

forcement of the old. Thus the state, having still more laws to enforce, but without adequate machinery to that end, sinks deeper and deeper into the deplorable morass of lawlessness. In desperation, it has sometimes even been suggested that the charters of boroughs and municipalities in which flagrant violation of state law occurs should be revoked and municipal home rule thus entirely abolished.[22]

For References and Collateral Reading, See End of Next Chapter.

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[22] Message of Gov. Tener of Pennsylvania, 1913, p. 9. A North Dakota statute of 1907 authorizing the governor to appoint an enforcement commissioner with power to exercise in any part of the state all of the common law and statutory powers of state's attorneys in the enforcement of the law against the manufacture and sale of intoxicating liquors was held unconstitutional in *Ex parte* Corliss, 16 N. D., 470, on the ground that it violated the reserved right of the people to have such laws enforced by officers of their own selection.

CHAPTER XVI

THE ENFORCEMENT OF STATE LAW (*Continued*)

Two main difficulties stand in the way of reaching a correct solution of the problem of state law enforcement in the localities. In the first place, under existing state legislation, there is a conflict between the will of the state as embodied in such legislation and the will of the locality in regard to the expediency of such legislation as applied to itself. Unfortunately, it frequently happens that the state undertakes to regulate by law matters in regard to which uniformity of policy is not essential to the well-being of the state, but which are in reality primarily local matters. Under these circumstances a proper consideration for the interests and sentiments of the localities would require the transfer to them of power to regulate such matters to suit themselves. For the solution of this difficulty, therefore, a broader legislative power should be granted to the localities than they now possess, somewhat similar to that which they enjoy in countries of Continental Europe, while state legislation should be confined to the regulation of matters which are of state-wide concern, or in which state-wide uniformity of policy is essential to efficiency of administration.

The second main difficulty, which stands in the way of reaching a correct solution of the problem of state law enforcement in the localities, lies in the fact that the officers who are charged with the duty of enforcing state laws are frequently charged at the same time with the performance of purely local functions and through the method of local election are for the most part subject only to the control of the

localities. Under these circumstances, such officers play a dual rôle and owe a double allegiance, and if they usually act as though their primary allegiance in case of conflict is to the locality at whose behest they hold their offices and fail to enforce a state law to which local sentiment is hostile, such a result is only a natural consequence of the position in which such officers are placed. To remedy this situation, two principal solutions may be suggested, and have been to some degree adopted. The first solution is to place such local officers under state control. This object may be effected in various ways, such as by taking their selection out of the hands of the localities and subjecting them to the direct appointment and removal of central administrative authorities. In this way the officers charged with the enforcement of state law will be brought under the pressure of responsibility to state-wide public opinion, which would ordinarily be more favorable to the enforcement of state law than would be the sentiment of many localities. To this solution of the second main difficulty, however, a legitimate objection may be urged. Since no new officers have been created, the law-enforcing officers who, by this proposed solution, have been placed under state control are still charged with the performance also of certain purely local functions. Moreover, proper regard for local interests requires that each locality should have some voice in the selection and control of those officers who perform in that locality functions of a purely local character, while, at the same time, due consideration for the interests of the state requires that the state should control the officers charged with the enforcement of laws of extra-local concern. A better solution of the second main difficulty, therefore, would consist in the separation of state and local functions and functionaries. Local officers, charged with the performance of local functions, should continue to be chosen and controlled by the localities, but should be shorn of all except local functions. For the regulation of matters of extra-local concern and for the en-

forcement of laws and the performance of functions in which the state as a whole is interested, state machinery and state officers should be created, who should be subject to the immediate control of central administrative authorities. Such new state officers would not necessarily exercise jurisdiction over districts corresponding exactly to the existing local political subdivisions of the state. Upon the supposition that the first main difficulty, enumerated above, has been met by a proper delimitation of the respective boundaries of state and local legislative power, the adoption of this proposed solution of the second main difficulty would bring about a situation in which local ordinances would be enforced by local officers while state laws would be enforced by state instrumentalities. Under these conditions, the state might avoid the imputation of facing two ways, of enacting laws and then not providing the machinery necessary to their enforcement.

Although efficiency in the enforcement of state law is impeded by the prevalent system of administrative decentralization and dependence on local authorities, nevertheless there are some indications of increasing state control or supervision over the enforcement of state law. To some extent, such supervisory power over law enforcement has been vested in the governor. The enforcement of the police laws of the state belongs primarily to the local officers elected for that purpose, but if such officers are derelict or impeded in the performance of their duties, the occasion may arise for action on the part of the governor. As has already been pointed out, the general power of the governor to see that the laws are faithfully executed is of little significance in the absence of further specific grant of power. This provision is "little more than a phrase, conferring not a single specific power and sanctioning merely the privilege of issuing proclamations or writing letters warning officials to do their duty."[1] In some states, however, fur-

[1] E. Freund, in *Political Science Quarterly*, ix, 408; cf. Opinion of the attorney-general of Vermont on the power of the governor of that

ther specific powers have been granted to the governor by constitution or statute. Thus, in many states, a small contingent fund is placed at the disposal of the governor which he may use in such ways as offering rewards for information leading to the arrest and conviction of law-breakers, employing independent investigators to learn if the law is being violated, to secure essential testimony or evidence, and employing special counsel to assist in the prosecution. The fund at the disposal of the governor to be used in this way, however, is usually too small to be of much real service in securing the enforcement of law. The use of such fund on the part of the governor is more effective if combined with the exercise of some other specific administrative power in the enforcement of the law. Thus, if the governor has the power of removing or suspending local officers charged with the enforcement of the law, he may sometimes effectively employ such fund in discovering through special detectives whether such officers are performing their duties in a faithful manner. In some states, notably New York and Wisconsin, the governor is vested with the authority to remove certain local law-enforcing officers, such as sheriffs and prosecuting attorneys, for such cause as seems to him sufficient. In other states the governor may remove such officers, but only for special causes stated in the law. Thus, in Illinois the governor may remove a sheriff from whose custody a prisoner is taken and lynched. The power of the governor to suspend or remove local law-enforcing officers for cause is a mere logical corollary from his responsibility under the constitution for seeing that the laws are faithfully executed, but unfortunately it is not generally granted to him. In most states the condition is very much as described by Governor Shafroth of Colorado: "I am required

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state to stop the exhibition of Jeffries-Johnson prize fight pictures, in violation of a state law prohibiting exhibitions liable to corrupt the morals of youth. *Biennial Report of Attorney-General of Vermont*, 1910-12, p. 21.

by the constitution to enforce the laws. But there is not a sheriff or other county officer that is dependent upon me; he can defy me; he can say 'I will not enforce those laws.' What is the efficiency of my office under those circumstances? The only power I have is to call out the militia to suppress something." [2] Theoretically, the sheriff is a deputy-governor, acting in subordination to the chief executive. Theoretically, the governor, "representing the sovereign executive power in the state, is always virtually present in court to execute its process whenever the power of the marshal and ordinary posse may not be sufficient for the purpose, or when the peace and dignity of the state may require." [3] But the governor has no authority to order a sheriff to release a prisoner committed to his custody by a judgment of court,[4] and if courts and juries fail to convict in the face of conclusive evidence of guilt, the governor is powerless to enforce the law through his own individual action.

Something, however, may occasionally be accomplished by the governor by means of publicity. As the most conspicuous officer in the state, any energetic action on his part tending to throw the light of publicity upon lawless conditions in any part of the state is apt to arouse and bring to bear a certain pressure of public opinion towards remedying such conditions. This power of the governor, however, is more effective when exercised in connection with some means of legal compulsion which may be brought to bear upon delinquent local officials. Thus, in New Jersey, it is provided by law that whenever the

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[2] *Proceedings of Governors' Conference,* held at Washington, January, 1910, p. 216. See also Annual Message of Governor Claude Matthews of Indiana to the legislature of that state, 1895, *Indiana Senate Journal,* 1895, pp. 39-42.

[3] Thomas *vs.* Mead, 36 Mo., 232.

[4] *Ex parte* Campion, 112 N. W., 585; cf. Cardoza *vs.* Epps, 23 S. E., 296. For a constructive proposal looking toward state supervision over sheriffs, see Fairlie, *Local Government in Counties, Towns, and Villages,* p. 268.

mayor or chief of police of any city shall receive from the governor or attorney-general a written statement that there is reason to believe that the state criminal law is being violated in designated places in such city, it shall be the duty of such mayor or chief of police to prosecute the guilty persons or to prevent the continuance of such violations of law. Failure on the part of such officials to take necessary action within ten days is declared a misdemeanor.[5] In 1912 evidence was presented to Governor Wilson of New Jersey by the Anti-Saloon League of that state showing the existence of lawlessness in Newark due to the inactivity of local officials. The governor thereupon wrote a letter to the chief of police of Newark as well as to the district attorney and sheriff of the county calling upon them to enforce the law. The evidence, he said, showed that the local officials "not only connived at lawlessness, but in some instances countenanced it in person." The governor had no power to remove these officials, but, said Mr. Wilson, "I have no means of enforcing this advice under the laws of the state except public opinion; but that is a very powerful and prevailing force in our day." Whatever control the governor may exercise over the enforcement of law through the force of publicity is largely an extra-legal power, and the extent to which it may become an effective instrument depends to a considerable degree on the personal qualities of the governor.

In some states, the power of the governor over state law enforcement has been strengthened by the enactment of laws vesting in him the authority to appoint special agents for the enforcement of particular laws. Probably the most frequent instance of this power of the governor occurs in connection with the enforcement of state prohibition or liquor laws. Thus, a South Carolina act of 1907 authorized the governor to appoint detectives to enforce the Dispensary Law of the state,

[5] New Jersey Public Laws, 1901, p. 366. See also Attorney-General *vs.* Fox, 72 N. J. L., 6.

regulating the sale of intoxicating liquor.[6] The special officers or agents appointed by the governor are sometimes authorized to exercise the same powers as are generally exercised by certain law-enforcing officers. The exercise of such powers on the part of the centrally appointed agents may be concurrently with the local officers, or may have the effect of displacing such local officers for the time being with respect to the enforcement of certain laws. Thus, a Maine law of 1905 authorized the governor to appoint a board of enforcement commissioners, who are in turn empowered to appoint deputies with authority to exercise in all parts of the state the powers of sheriffs in their counties in the enforcement of the law against the manufacture and sale of intoxicants.[7] Similarly, an act passed in Oklahoma empowered the governor to appoint a special attorney who should, at the direction of the governor, assist in enforcing the state prohibition law and should have all powers of county attorneys in their respective counties.[8] The power vested in the governor to appoint special enforcing agents is sometimes developed into one of a more general character, and not confined to the enforcement of any particular law. Thus, a recent Oregon law,[9] after reciting in a preamble that "whereas the constitution requires the governor to take care that the laws be faithfully executed and enforced, and whereas there is no adequate provision by statute to effectually carry out the mandate of the said constitutional provision by vesting the governor with authority to compel observance of said provision," enacted that whenever, in the

[6] Under this act, the governor was held to have the power of conclusively determining the necessity for the appointment of the detectives. Banks *vs.* Wells, 75 S. E., 791. See also, South Carolina Session Laws, 1905, Ch. 470.

[7] Maine Laws, 1905, Ch. 92; Gilmore *vs.* Penobscot Co., 78 Atl., 454.

[8] Oklahoma Laws 1907-08, Ch. 69, Art. 3, Sect. 24; State *vs.* Maben, 114 Pac., 1122; Flood *vs.* State, 27 Okl., 852. But see *Ex parte* Corliss, 16 N. D., 470.

[9] Session Laws, 1913, Ch. 180.

opinion of the governor, the criminal laws of the state are not being faithfully executed and enforced in any district of the state, he may lay the facts before the circuit court for investigation in a summary manner. If the court finds that the criminal laws are not being faithfully executed, the governor may appoint for a limited period such special officers, as sheriffs, district attorneys, or constables, as may be necessary to correct the failure to execute the laws. Such special officers under the direction of the governor are to exercise the same powers as the regularly elected officers.

Such special powers of the governor in law enforcement, however, are found only in exceptional cases. The usual means which the governor utilizes for this purpose is the calling out of the state militia. The character of the state militia indicates in some degree the extent to which it may be used in law enforcement. Since it is composed for the most part of men whose regular work lies in other fields, it is not suitable for utilization as a permanent body for ordinary law enforcement. It is rather intended as a body to be specially called out on extraordinary occasions when the ordinary machinery of law enforcement proves temporarily insufficient or derelict. In the absence of any regular, ordinary state machinery for the enforcement of state law, that function rests primarily with the local law-enforcing authorities. "The enforcement of police laws," it has been said, "does not belong to the governor, as the chief executive officer of the state, but belongs to the officers elected for that purpose in conformity with the provisions of the constitution. The constitution does, however, contemplate that when the regular administration of the law through the courts of justice is interrupted by violence or civil commotion the governor may, by the military arm of the government, enforce the law. Until such event occurs the law is enforceable in the regular way, through the courts, and the governor has nothing to do with its enforcement except where that duty shall be especially enjoined upon him, either

by the constitution or by some statute." [10] It scarcely seems necessary, however, that the duty should be specially enjoined upon him, but merely that the power should be specifically granted to him. If the power is granted, then, as pointed out above,[11] the governor is the final judge as to whether the occasion justifies the exercise of the power. To this general rule, however, there are some exceptions. In one or two states, the governor can call out the militia only with the consent of the legislature. Furthermore, the constitutions usually specify the objects for which the militia may be called out, such as to execute the laws, suppress insurrection and repel invasions. The term "execute the laws," is, on its face, broad enough to include almost any use of the militia for the purpose of law enforcement, and the courts seldom attempt to limit the discretion of the governor in this respect. It has been held, however, that the governor has no right to call out the militia to enforce his order removing members of a board of police commissioners. "The constitutional provision 'to execute the laws,'" it was said, "contemplates the enforcement of a judicial process, *i.e.*, the enforcement of a right or remedy provided by the law and judicially determined and ordered to be enforced, and not an arbitrary enforcement by the executive of what he may consider the law to be." [12] It has also been intimated that the constitution and statutes do not contemplate any interference on the part of the governor if local officers should merely refuse or neglect to enforce the law, but only where civil commotion renders them unable to enforce it.[13] This, however, is too narrow an interpretation of the governor's power, and would frequently prevent the governor from using practically the only means at his disposal to

[10] "Opinions of the Attorney-General of Illinois, 1905-6," p. 371.

[11] Ch. V.

[12] *In re* Fire and Excise Commissioners, 19 Colo., 482 (1894); Trimble *vs.* People, 19 Colo., 187.

[13] "Opinions of Attorney-General of Illinois, 1905-6," p. 372. But see *Ibid.*, 1913, p. 81.

cope with a condition of widespread lawlessness due to the fact that the local authorities, charged with the enforcement of the laws, are in sympathy with the lawless element. Although the governor usually defers the calling out of the militia until requested to do so by the local authorities, he nevertheless may and sometimes does call them out not only in the absence of any request from such local authorities but against their wishes.

Although the militia are not infrequently called out to quell mobs and prevent lynchings, their most conspicuous use within recent years has been in suppressing disorder incident to strikes of organized labor. There are few states of industrial importance in which it has not recently been necessary to call them out for this purpose, but the instances occurring in Michigan, Montana, Colorado, and West Virginia may be specially mentioned. A question which arises when the militia are called out is that of the relation which is to exist between the military authorities and the local civil authorities. In the Michigan copper strike of 1913, the militia were called out to aid the local civil authorities to preserve the peace. The commander of the militia in the field even secured written authority from the sheriff to make arrests and to use such force as might be necessary to preserve order in the county.[14] The interference of the state in the Montana strike of 1914 was preceded by a proclamation of martial law by the Governor. The commanding officer of the state militia thereupon suspended and took over the government of Butte and Silver Bow County, and the civil authorities, such as prosecuting attorney and police court, ceased to exercise their powers.[15] It was subsequently held by the supreme court of the state, however, that, under the Montana Constitution, the Governor's procla-

[14] "Strike in the Copper Mining District of Michigan," U. S. Senate Doc. No. 381, 63d Cong., 2d Sess., p. 51.

[15] H. W. Ballantine, "Unconstitutional Claims of Military Authority," *Journal of Criminal Law and Criminology*, v, p. 718 ff.

mation of martial law and the placing of a section of the state under military rule could not have the effect of suspending the writ of habeas corpus nor the right to jury trial.[16]

By the constitutions of most of the states, it is provided that the military shall be in strict subordination to the civil power, but this restriction is frequently not observed except technically through the fact that the governor acts in his civil capacity when commander-in-chief of the militia. In 1904, the Governor of Colorado declared a county of that state to be in a state of insurrection and rebellion and ordered out the militia to suppress it. The military authorities arrested persons on suspicion of participation in the disorder, and detained them in custody under the orders of the Governor during the continuance of the insurrection. The question of the legality of this action having been brought into the Supreme Court of Colorado, it was held that neither the determination by the Governor of the existence of the insurrection nor the legality of the arrest and detention of persons in custody of the military authorities is subject to review by the courts.[17] This opinion was sustained by the Supreme Court of the United States, which further declared that "when it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessity of the moment. Public danger warrants the substitution of executive process for judicial process." [18]

That the power of the governor may at times expand in a manner analogous to that of the president in time of war was illustrated by the situation which recently arose in West Virginia as the result of the miners' strike in that state. In 1912 the Governor of that state proclaimed martial law within a

[16] *Ex parte* MacDonald, 143 Pac., 947.

[17] *In re* Moyer, 35 Colo., 159.

[18] Moyer *vs.* Peabody *et al.*, 212 U. S., 78, 85. See also "The Power and Authority of the Governor and Militia in Domestic Disturbances," a brief prepared by H. J. Hersey, former deputy attorney-general of Colorado, for the United States Commission on Industrial Relations.

prescribed zone, sent the state militia therein, and appointed a military commission of six military officers to try all offenders, except members of the militia, and a court-martial to try the latter. The rules, regulations, and instructions for the guidance of the military commission were promulgated by the Governor through the Adjutant General, and provided that the commission should be a substitute for the civil and criminal courts of the district covered by the martial-law proclamation, and that all offenses against the civil laws as they existed prior to the proclamation should be regarded as offenses under the military law, and as a punishment therefor the commission could impose such sentences as they might see fit. During the period of nearly eight months in which martial law continued, a large number of citizens of the state were convicted and sentenced by the commission without indictment or jury trial. The constitution and statutes were practically suspended by reason of the existence of martial law.[19] Persons whom the Governor or the commission had reason to believe were encouraging or participating in disorder were summarily arrested and imprisoned, and a newspaper, the circulation of which in the territory under martial law was deemed by them to be an incitement to riot, was summarily suppressed.

By this extreme expansion of the military power of the Governor, his will became practically the supreme authority in the territory under martial law, and the exercise of ordinary private rights was very seriously interfered with. In several important cases, however, which arose in the Supreme Court of the state involving the action of the Governor, that tribunal upheld his power to declare a state of war in a prescribed territory and to appoint a military commission for the trial and punishment therein both on the ground of necessity and self-preservation of the state and as an incident to his military power under the Constitution. The court furthermore held that the

[19] William Gordon Mathews, "Martial Law in West Virginia," U. S. Senate Doc. No. 230, 63 Cong., 1st Sess.

necessity for the exercise of this power by the governor rests within his official discretion and is not reviewable by the court.[20] It appears, therefore, that the governor in calling out the militia, can do so only to effect the objects stated in the constitution, *i.e.,* to execute the laws, suppress insurrection and repel invasion, but, in endeavoring to accomplish these objects, he may adopt such measures as to him seem necessary for the purpose, even to the extent of temporarily suspending the ordinary laws and courts and of exercising practically dictatorial power. It furthermore appears from the doctrine of these cases that, for any protection against the arbitrary action of the governor under these circumstances, recourse must be had, not to the courts, but to the political responsibility of the governor to the people.

From the experience which we have had with the use of the militia in enforcing state law, some inferences may be drawn as to the effectiveness of this instrument in accomplishing the object in view. The militia may be useful as a reserve force to be used on extraordinary occasions, but for the ordinary enforcement of law it is not available. "To call out the militia," as Governor Shafroth said, "to close a saloon on Sunday would be one of the most ridiculous things in the world." [21] It would be as though one used a trip hammer to break an egg-shell. Such ordinary enforcement of law requires a regular permanent police force. It is needless to say that the state militia does not answer this description. Furthermore, on account of the length of time that it takes the militia to reach the scene of trouble after being called out, they are not usually available to prevent an outbreak of lawlessness, but only to suppress it after it has happened. But in the meantime, much property may be destroyed and lives endangered by the lawless element. After being called out, they

[20] Hatfield *vs.* Graham, 81 S. E., 533; State *ex rel.* Mays *vs.* Brown, 71 W. Va., 527; *Ex parte* Jones, 71 W. Va., 609; 77 S. E., 1029.

[21] *Governor's Conference Proceedings,* 1910, p. 217.

cannot be kept on the scene indefinitely, but must in time be withdrawn, and it has been the frequent experience that outbreaks of lawlessness at once recurred upon the withdrawal of the troops. Again, the use of this instrument for the enforcement of state law is not only cumbrous but also expensive. The actual expense sometimes runs as high as a million dollars, as in Pennsylvania in 1902, not counting damage to property and other losses.

The use of the militia in labor troubles has been satisfactory on the whole neither to the employers nor to the employees. The employers, having expensive plants to protect from violence and not always feeling safe to depend on the state for protection, have frequently found it necessary to employ private and practically irresponsible guards to protect their property. The use of the militia in such troubles has also given rise to a bitter feeling towards them among members of labor unions, who are inclined to look upon the militia as little better than the tools and hirelings of the capitalists. This attitude on the part of the labor unions may be unjustifiable, but that it exists is undeniable. The unions have endeavored at times to prevent their members from serving in the militia, and New York and California have found it necessary to pass a law forbidding labor unions to pass by-laws against the service of their members in the militia.[22] The political influence of labor has occasionally been so great that legislatures have sometimes been afraid to appropriate funds sufficient to pay the small wages of the militia.[23]

As is indicated by the term "National Guard," which is frequently applied to the state militia, the primary and fundamental purpose of this body is to assist the small standing

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[22] Stimson, *Popular Law Making*, p. 281; California Penal Code, Sect. 421.

[23] The militia in the Colorado strike of 1914 went unpaid for four months. See article by Ex-Governor Ammons on "The Colorado Strike," in *North American Review*, July, 1914.

army in national defense. If it is to be able to accomplish this purpose satisfactorily, then it should be freed from strike duty and other police functions by which it may become entangled in internal social or political struggles. The militia is not fitted for police duties and a state police force or constabulary should be provided for this purpose. To the lack of such efficient means of ordinary law enforcement as would be afforded by a state constabulary may be ascribed, at least in part, the necessity for such an extreme stretch of the governor's military power as occurred in the West Virginia case described above. The dictatorial power of life and death in the hands of any one man in the state, however able and upright he may be, is not a pleasant spectacle for free men to contemplate. In cases of necessity it must be endured as a temporary evil, the justification for which lies in the fact that it is the only available means for averting greater evils and for bringing about a more stable condition of peace and order. It is not the part of wisdom, however, to rest content with conditions which may render the recurrent exercise of such extreme stretches of power necessary, if it can be avoided by the adoption of other measures. The establishment of a state constabulary would probably render the necessity for the exercise of such extreme power, if not always avoidable, certainly less frequent.

A few states, in which the responsibility for state enforcement of state law is more keenly realized than in others, or in which peculiar local conditions conducing to lawlessness exist, have already established state police forces. Perhaps the most important of these are the Massachusetts District Police, the Connecticut State Police, the Pennsylvania Constabulary, and the Texas Rangers. Probably the first body of state police in the United States was that established in Massachusetts by an act of 1865. Its members were appointed and removable by the governor and council. Although created primarily for the purpose of enforcing the

state prohibitory liquor law, the force was charged with the enforcement of all state laws. The Governor of Massachusetts, in vetoing a bill passed in 1868 for the abolition of the state police, said: "It is apparent that public decency and order and public justice require the maintenance of an executive body which shall not be controlled by the public sentiment of any locality; which shall be competent in its spirit, its discipline and its numbers to a reasonable and judicious but just and impartial enforcement of the statutes of the commonwealth." [24] In 1879 the state police department was reorganized and, although known as the district police, continued in reality to be a state police force. Its members are appointed by the governor and removable by him. The force, which now consists of about eighty men, is divided into an inspection department and a detective department. The former is charged with the inspection of factories, public building and steam boilers. The members of the detective department are empowered to act when the local officials are unable or neglect or refuse to enforce the laws. They are at the command of the governor in preserving order and suppressing riots and disorder in any part of the state. The local district attorneys may call upon the state police for aid in the investigation of crimes and in the collection of evidence against criminals, and the state police uniformly coöperate with the local authorities in such matters. The powers and duties of the state fire marshal are also now vested in the state police. The chief of the state police is at the head of all its different departments.

The state police department of Connecticut was established in 1903.[25] It is, in the main, a state bureau of criminal investigation. It is charged with the duty of assisting in the detection, investigation and prosecution of crimes when re-

[24] Quoted by Whitten, "Public Administration in Massachusetts," *Columbia University Studies*, viii, p. 469.

[25] Connecticut Acts of 1903, p. 100.

quested by the governor or local prosecuting officers. In carrying out these functions, the state police are authorized to exercise the same powers as sheriffs, police officers or constables. They are also charged with the inspection of moving picture machines and pawnbrokers' shops, with the duties of the state fire marshal, and with enforcing the act relating to motor vehicles, when requested by the secretary of state or local officers.

The largest state police force maintained by any state is that of Pennsylvania. It was created by an act of 1905, consists of more than two hundred mounted officers and men, and is modeled after the Canadian northwestern mounted police. Under a Pennsylvania act of 1865, certain corporations were allowed to employ private policemen or guards to protect their property. These so-called "coal and iron police" became extremely unpopular with the employees of the corporations, for they were paid and controlled by the property-owning corporations. In the mining districts of the state there were large numbers of recently arrived immigrants and frequent strikes and labor troubles occurred. When the "coal and iron police" were unable to cope with the situation, Pinkerton men were employed and the sheriff swore in deputies and summoned the *posse comitatus*. In severe disturbances, these measures usually failed and it sometimes became necessary for the governor to call out the entire state militia and declare martial law. This method of quelling the disturbance was slow, cumbrous and expensive. To deal with such disturbances in an efficient and expeditious manner was the primary object of the establishment of the Pennsylvania Constabulary in 1905. The superintendent of the constabulary is appointed by the governor and senate and is made entirely responsible for the selection and management of the men under him. The members of the force are divided into four troops and stationed in different quarters of the state. They are empowered to make arrests without warrant and to

serve and execute warrants issued by the proper authorities; to coöperate with the local authorities in detecting crime, apprehending criminals and preserving law and order throughout the state; and to act as forest, fire, game and fish wardens.

Although the Pennsylvania Constabulary is a police force, nevertheless it has all the appearances of a military force, and its presence usually inspires respect even from the lawless class. A dozen members of the constabulary have been known to quell a mob of several hundred persons. Of the arrests made by the constabulary, an average of about 90 per cent are convicted. This is due, in part at least, to the fact that the members are instructed in the criminal laws of the state and know what evidence it is necessary to secure for conviction. Although they have aroused the enmity of some of the labor unions, who have dubbed them the "American Cossacks" and have attempted to have the force abolished, and although some friction and opposition on the part of local authorities has been engendered in some instances, nevertheless the establishment of the state police has undoubtedly brought about a more efficient enforcement of law. Although the force has on a number of occasions been used to meet emergencies such as riots and labor disturbances, its duties are by no means confined to such emergencies. In fact, although it has sometimes done notable service in the cities, as in the Philadelphia street car strike of 1910, its principal function has been to act as a continuous rural police for the apprehension of the perpetrators of ordinary crimes, for which the use of the state militia would be entirely impracticable. During the first seven years of its history, the constabulary traveled over more than three million miles of rural roads and made more than 45,000 arrests. They have assisted in extinguishing forest fires, have made many arrests for the violation of the game laws, and have frequently assisted the health officers in maintaining quarantine during an epidemic of some contagious disease and in preventing the

pollution of streams. They have confiscated supplies of opium and dynamite and have raided gambling resorts, disorderly houses and places where liquor was being illegally sold. They have afforded protection from fire, flood and other troubles to localities which have no adequate police force and are too far removed from large centers of population to obtain quick aid in case of necessity.

In view of the services rendered by the state police, its value can scarcely be doubted. Its members are mostly army men, trained and picked solely with reference to their qualifications for the work. In the management of the force there is unity and concentration of control, action and responsibility. The force is not affected by political considerations nor by the prejudices, influences or unconscious restraints which sometimes render local constables and police forces useless for the enforcement of state law. The cost of maintenance of the state police, moreover, is small in comparison with the benefits. The Massachusetts District Police costs about $200,000 a year, while the annual expenditure on account of the Pennsylvania Constabulary is now somewhat more than $300,000. The mere additional security afforded to the residents of the state is amply sufficient to counterbalance this expenditure, but to such additional security should be added the additional amounts of fines, forfeitures and confiscations which accrue to the state, the prevention of property losses by fire, theft, and violence, and the increase in property values which results from the greater security arising from the existence and activities of the state police. There is also a great saving to the state due to the fact that the existence of the state police frequently renders it unnecessary for the state to undergo the expense of calling out the state militia. Since the establishment of the Pennsylvania Constabulary, it has not been necessary to call out the militia in that state, although on a number of occasions an amount of disorder existed which would have rendered the calling out of the militia

necessary if the constabulary had not existed. During the existence of the Massachusetts District Police, it has also been unnecessary to order out the militia except in the case of the Lawrence strike of 1913. The existence of the state police, by rendering the use of the militia for strike duty ordinarily unnecessary, is likely to have a beneficial effect upon the latter body. Enlistments in the militia are likely to increase both from the class of organized labor and from others who are deterred from enlisting by dislike for strike duty. Moreover, the withdrawal of the militia or National Guard from use in labor troubles and from police duty in general would probably enable it to approximate more nearly to a really national institution to be used as a reserve in case of war.[26]

The failure or inability of local authorities in the rural districts to enforce the law in their jurisdictions has been the primary reason for the establishment of the state police. If it be argued that the state constabulary system encourages local law enforcing officials to permit their organizations for crime detection to become atrophied through reliance on the state police, the answer is that in many rural districts they are already in this condition. This situation was realized in Indiana as early as 1852, when a law was enacted legalizing private associations formed for the purpose of detecting and apprehending horse thieves and other felons. The members of these associations were "entitled to all the rights and privileges of constables. They arrested and punished individuals without bringing them before the ordinary legal tribunals of the state." [27] Such a dangerous grant of power to private associations would not now be considered a proper remedy for the breakdown of the local machinery of law enforcement.

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[26] On the Federalization of the National Guard, see N. W. MacChesney, "National Defense—Constitutionality of Pending Legislation," in *University of Pennsylvania Law Review,* February and March, 1916.

[27] Rawles, "Centralizing Tendencies in the Administration of Indiana," *Columbia University Studies,* xvii, p. 308.

On the other hand local sentiment does not even yet readily tolerate complete state centralization of law enforcement in the localities. Moreover, local officers, even in rural districts, are fairly efficient in the performance of certain functions, such as acting as the executive officers of local courts and executing civil process, and may be retained for these purposes. But for the more serious business of enforcing state law in the rural districts, a state police force is almost a necessity. In the cities, the feeling in favor of the maintenance of the principle of home rule is stronger, and, moreover, the cities are better policed by their local constabularies than are the rural districts. The principle of home rule requires that the city police should be appointed, officered and governed by local authorities. But the failure or refusal of city police forces to enforce certain state laws which were not favored by local sentiment, such as Sunday closing and prohibition laws, has led in some states to a movement for state controlled municipal police. Such centralized administration of the police force of a particular city or metropolitan area was first introduced in New York in 1857, and in 1861 was applied to Chicago.[28] A somewhat rudimentary form of such control was applied to Cincinnati in 1886 through the creation of a centrally appointed board which should act as an advisory body to the executive head of the city police force. In 1883, Indiana provided by law for the appointment by state authority of boards of police commissioners for all cities of 29,000 inhabitants or over, and the system was subsequently extended to other and smaller cities. The system of metropolitan police has received its most extensive application in Baltimore, Boston and St. Louis. The police forces of Baltimore and St. Louis have been placed under boards of police commissioners appointed by state authority, while in the case of Boston there is a single commissioner appointed by the governor of the state. It has been recommended by the governor of

[28] Illinois Public Laws, 1861, p. 151.

Maryland that the board of police commissioners for Baltimore, consisting of three members, be displaced by a single commissioner, with a salary sufficient to justify him in devoting his whole time to the office.[29] The Boston police have been under state control since 1885, and this has served to remove them in a measure from the influence of local politics. "There can be no doubt whatever that the system of state control has brought about a most marked improvement in every branch of Boston's police administration."[30] On the other hand, the placing of city police under state control has sometimes been effected largely for political reasons, with the result that the city police force is under the control of the state boss instead of the city boss. A bi-partisan state board tends to foster such partisan-political control. Nevertheless, in the enforcement of laws such as those regulating the liquor traffic, which are opposed by local sentiment but which presumably represent state-wide sentiment, a state controlled police force is apt to be more efficient. "The necessity of central administrative intervention in the control of the liquor traffic is usually deduced from the importance of breaking a circuit of vicious influences, whereby the saloon, as an institution, controls voters, voters elect the local authorities, and the local authorities appoint and direct the officers of the law. By putting the officer under central responsibility and local irresponsibility, he is freed, to a great extent, from the force of politico-personal influence that can be brought to bear by directly interested parties. The principle cuts both ways: The officer is no more bound to observe the better sentiment of the community than he is free to disregard the wishes of the vicious element. Influences may also operate on the central administrative head similar to those which corrupt local

[29] Message of Governor Crothers of Maryland, 1912. *Maryland Senate Journal*, 1912, p. 76.

[30] G. H. McCaffrey, "The Boston Police Department," *Journal of Criminal Law and Criminology*, ii, p. 678.

authorities. The whole scheme may seem to be a mere removal of the place of barter from the city hall to the state house. This very removal, however, puts the field of action upon a higher plane. . . . Whatever the inducements that may be offered the governor to favor particular interests in the metropolis, they cannot be brought to bear upon him with such direct force as upon the mayor whose entire constituency is in the field of their immediate influence. The governor is, at least in part, outside the vicious circle." [31]

A legitimate objection, however, may be urged against the system of metropolitan police. Although city police have been held by some courts to be state officers and are charged with the duty of enforcing the law of the state within their jurisdiction, nevertheless a large part of their functions consists in the enforcement of local ordinances. Moreover, the connection between the work of the police and of other departments of the city government is so close that disorganization may be injected into the administration of municipal affairs unless all the departments of the city government are under the supervision of a single head. This objection might be met by allowing the cities to retain control of their police forces, which would be charged with the enforcement of local ordinances and state laws which the state is no more interested in enforcing than the municipality, while transferring to an enlarged state constabulary the enforcement in the cities of such state laws as experience has shown the locally controlled police department cannot be depended upon to enforce.

While thus yielding to the cities the immediate control of their local police forces, the state might still retain some degree of supervision over them. The state might set up a standard of efficiency for municipal police forces and exact a penalty from those cities whose forces fall below the stand-

[31] Sites, "Centralized Administration of Liquor Laws," *Columbia University Studies,* x, pp. 402-403.

ard, while granting aid to those whose forces meet or surpass such standard. The administration of such a system of state supervision over municipal police forces would doubtless require the creation of a state police commissioner or department. The determination of the efficiency of municipal police forces would require that the state police department be vested with adequate powers of inspection and investigation. The discovery through such investigations of conditions of glaring inefficiency in city police forces might assist in remedying such conditions not only through the exaction of the proposed penalty but also through the publicity which the exposure by the state department would entail. The head of the state police department would have immediate charge of the state constabulary as well as supervision of the city police forces, and the department might serve as a center of information regarding statistics of crime and criminal conditions in all parts of the state.[32]

Although a state police force might be utilized to a considerable extent in connection with the newer phases and enlarged sphere of state activities, as in the case of the Massachusetts District Police, nevertheless the work of such a force will doubtless continue in large measure to consist of the performance of conventional police functions. However, although the repressive activities of the state are still of fundamental importance, the work of the state is becoming more and more developmental in character. Repressive and developmental functions, however, cannot be wholly separated, for in the performance of its developmental functions, the state frequently finds it necessary to take repressive measures. Thus, the term "compulsory education" may seem to some a

[32] L. F. Fuld, in his "Police Administration," pp. 418 ff., suggests that there should be established in each state a state police department in charge of a state commissioner of police and divided into three bureaus,—a bureau of rural constabulary, a bureau of criminal investigation, and a city police bureau.

contradiction in terms, yet it illustrates this close connection between the developmental and repressive functions. Again, in conserving the public health, the state may find it necessary to suppress or abate nuisances which menace it. Such a combination of the developmental and repressive functions of government is frequently vested in the same state agency or department.

As a general rule, each of the numerous boards, commissions and bureaus found in the various states is charged with the enforcement, or with the supervision of the enforcement, of some portion of the substantive law of the state.[33] Thus, the Wisconsin Industrial Commission is charged with the administration and enforcement of a considerable portion of the laws of that state relating to the conditions of employment. Seldom, however, is the complete enforcement of an act vested in any state administrative agency or authority without the concurrent action of some other authority, state or local, administrative or judicial. A state administrative agency may be vested with powers of investigation to discover whether the law is being violated. If there exists no further power than that of investigation and recommendation, as in the case of the Massachusetts Railroad Commission of 1869, then practically the only means of enforcement is through the force of public opinion resulting from exposure and publicity. Sometimes the discovery by the state board or commission of violations of law may render the guilty persons liable to prosecution in court, but for the maintenance of such prosecutions the state board is dependent upon the coöperation of the local prosecuting attorney of the county in which the vio-

[33] The law thus enforced by state boards may either be enacted in detail by the legislature, or the board may itself be authorized to enact the laws which it is created to enforce. Thus, the State Health Department of New Jersey is empowered to enact a sanitary code, which shall have the force and effect of law and be observed throughout the state. New Jersey Session Laws, 1915, Ch. 288.

lations occur,[34] or the board may be dependent upon sheriffs, constables and other local conservators of the peace to make arrests for the violation of the state law. The unreliability of such local officers, for this purpose, however, has frequently resulted in the extension to the officers, agents and employees of state boards and departments of the concurrent, if not exclusive, power of exercising such police functions. For example, California has vested in the deputies and agents of the state labor commissioner the power and authority of sheriffs and other peace officers to make arrests and to serve any process throughout the state in the enforcement of the state labor laws.[35] The Illinois Fish and Game Commission, its wardens and deputies, are empowered, without warrant, to arrest anyone violating provisions of the fish and game law.[36] The members of the state department thus become a special state police force for the enforcement of the particular portion of the substantive law of the state intrusted to their charge.

In order to safeguard private rights from encroachment through arbitrary administrative action, it has usually been deemed necessary that any such action should be subject to judicial review. The promotion of the social welfare, however, often requires a considerable scope of administrative action. We find, therefore, that even where final court action may be necessary, the enforcement of state law may be secured to a considerable extent through preliminary actions of administrative authorities. Thus, though convictions may be had and penalties imposed only by the courts, nevertheless the enforcement of state law is promoted by the more efficient machinery for the detection of its violation which the

[34] Thus, prosecutions for violation of the pure food law of Illinois are under the control of the state's attorney of the proper county. Illinois Session Laws, 1915, p. 710, Sect. 40 A.

[35] Statutes of California, 1915, Ch. 484.

[36] Illinois Session Laws, 1915, p. 461.

state administrative agency affords, and violations may be prevented through the fear of detection inspired by the existence of such machinery. State boards and departments, or their agents, are frequently empowered to take preliminary action having an important bearing upon the enforcement of the law. State administrative agencies, in the exercise of the police power of the state, may adopt special methods which may have the effect of preventing the violation of the law. Such methods secure publicity and regulation through such devices as licenses and permits, bonds and deposits as security, requirement of notices, marks and signs, reports and registration, and inspection and search.[37] Such preliminary action may be taken either against things or persons. Thus, short measures, incorrect weights or scales, impure articles of food, and game and fish illegally had in possession, may be seized and held to be used in evidence. Persons suspected of violation of law may be arrested or may be notified to appear before a state board for a preliminary hearing. In conducting such hearings and inquiries the board may be empowered to administer oaths, subpena and examine witnesses and issue subpenas *duces tecum,* requiring the production of books and papers. As the result of such hearing the board may revoke licenses to engage in certain professions or businesses, or may start prosecutions in the proper court. If, however, the person whose license has been revoked continues to practice the profession, or persons who are subpenaed to appear at such hearings fail to appear, or refuse to testify or testify falsely when they appear, the state board may be compelled to resort to court action. In order to avoid the danger of unconstitutionality through violation of the principle of separation of powers, Virginia and Oklahoma have provided in their constitutions for corporation commissions and have invested them with the powers of a court to enforce their orders by their own processes. But even in these cases, appeals

[37] Freund, E., *The Police Power,* pp. 31-44.

may be taken from the orders of the commission to the supreme court of the state.[38]

The idea that judicial review is necessary to safeguard individual rights is still strongly imbedded in the laws, and conclusiveness of administrative determinations by state authorities is seldom found. It happens not infrequently, however, that, for practical purposes, the action of state administrative authorities may be final in the sense that nothing further is actually necessary to secure the enforcement of the law. The laws regarding the safeguarding of machinery in factories, for example, are usually enforced through inspection by the agents of the state factory department, who give instructions as to such changes as may be necessary to satisfy the requirements of the law. These instructions are usually complied with, and prosecutions are therefore seldom necessary. The preventive rather than punitive character of state administrative action also frequently renders resort to court procedure unnecessary. Moreover, even when court action becomes necessary, the scope of judicial review may in various ways be narrowed and that of administrative action correspondingly broadened. Thus, as in the case of the determinations of the California Industrial Welfare Commission, judicial review may have to do merely with the methods whereby the determination was reached and not with the subject matter of the determination, or, as in the case of the Oregon Welfare Commission, no appeal is allowed from the decision of the commission upon any question of fact. The scope of administrative action of a state board may also be virtually widened through the provision making it unnecessary that such board should bring prosecutions to secure compliance with the law or punish violations of it, but empowering the board to enter and enforce directly an order, which becomes the final determination of the matter unless the individual or corporation

[38] Constitution of Virginia, Sect. 156; Constitution of Oklahoma, Art. IX, Sect. 19.

against whom the order is entered appeals from such order to the proper court. In spite, however, of the gradually narrowing scope of judicial review, it still remains true that administrative action is largely preliminary in character, and for the final enforcement of the law or for the imposition of penalties for its violation and even, in some cases, for the holding of preliminary proceedings, resort to court action is still necessary. It is therefore desirable to consider the efficiency of judicial procedure as the final factor in the enforcement of state law.[39]

Federal Enforcement of State Law.—Before concluding this chapter attention may be briefly called to the influence which the activities of the organs of the National Government may have upon the enforcement of state law. Such influence may be exerted either by way of impeding or of facilitating the enforcement of state law. The former result may be obtained, for example, through application or petition made to the Federal courts for an injunction restraining the enforcement or execution of a state statute, by restraining the action of a state officer or administrative board, on the ground that the state statute, under color of whose authority the state officers are acting, is in violation of some provision of the Constitution of the United States. If a temporary injunction is granted, but is subsequently dissolved because the contention of the petitioners cannot be sustained, the result is that the enforcement of state law has been at least temporarily impeded through the action of the Federal courts.

For the most part, however, the influence of the activities of national organs or agents is in the direction of facilitating or assisting in the enforcement of state law. Such influence may be exerted either directly or indirectly. Thus, Federal aid may be brought directly to the assistance of a state in putting down domestic violence within its borders, upon application of the proper state authority. Again, a particular act may

[39] See below, Ch. XVII.

be at the same time a violation of both state and Federal law. Under these circumstances, the activity of the Federal authorities in preventing or punishing the commission of such act has the collateral effect of enforcing the state law. Thus, frauds at elections may, under certain circumstances, be a violation of both state and Federal law. Where the persons accused of such violations have local political influence, prosecutions in the Federal courts are more likely to be successful than in state courts. Similarly, the seizure by the Federal authorities of the books and papers of persons accused of fraudulent use of the mails may assist in the enforcement of state "blue sky" and other laws.

The efforts of state authorities in enforcing state law may be assisted through the practical coöperation of Federal authorities and bureaus. Thus, the United States Public Health Service and the Bureau of Animal Industry at Washington may assist the proper state authorities in enforcing state laws for the protection of the public health or in stamping out epidemics. Again, the statistical data, collected by Federal authorities in the enforcement of Federal law, may be utilized by state authorities in the enforcement of state law. Thus, the enforcement of the state laws regarding the collection of an income tax and the regulation of railroads may "lean up" against the returns received under the Federal income tax law or by the Interstate Commerce Commission. In this connection, it may also be noted that, in some states, the mere possession of an internal revenue receipt from the United States Government is declared to be *prima facie* evidence of an offense against state law. The so-called "interstate criminals," such as the operators of syndicated bucket shops in different states, are more easily reached by Federal than by state authority.

An important aspect of Federal influence upon the enforcement of state law is in connection with the use and sale within a state of articles which pass through the channels of interstate

commerce or are subject to Federal internal revenue taxes. Thus, anti-narcotic laws, though found on the statute books of a majority of the states, were comparatively ineffective until the enactment of the Federal anti-narcotic law of 1915, known as the Harrison Law. Again, under the Lacey Game Law passed by Congress it is made unlawful to transport into any state game which has been killed or shipped in violation of state law. Federal power over the regulation of interstate commerce has been of special importance in connection with the enforcement of state liquor laws. Such power, when exercised, has the effect of setting aside any conflicting state regulations. In order to uphold such regulations, Congress has done what it could to enable the states to enforce their own laws. Thus, under the Wilson Original Package Act of 1890, all intoxicating liquor transported into any state was made, upon its arrival, subject to the operation of the laws of such state enacted in the exercise of its police powers.[40] In 1902 the same rule was applied to the transportation of oleomargarine, butterine, and other articles of interstate commerce.[41] The Webb-Kenyon Act of 1913 prohibited the shipment from one state into another of intoxicating liquor intended to be used in any manner in violation of state law.[42]

Through various other activities the Federal authorities may incidentally assist in the enforcement of state law. Thus, the Federal courts, in the exercise of their jurisdiction in bankruptcy matters, may assist in the enforcement of the state law against the sale of liquor on Sunday. A number of saloons which were owned and operated by a brewing company in Chicago were kept closed on Sunday in accordance with state law, during the period of a receivership which resulted from bankruptcy proceedings in the Federal District Court. The Federal courts may also exert some indirect influence upon the

[40] 26 U. S. Statutes at Large, 313.
[41] 32 Statutes at Large, 193.
[42] 37 Statutes at Large, 699.

enforcement of the state Sunday closing law by denying citizenship to alien applicants operating saloons in violation of such law, or by canceling the citizenship certificates of saloonkeepers who obtained naturalization papers upon the strength of false statements that they had not violated such law.

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CHAPTER XVII

THE ADMINISTRATION OF JUSTICE

Administrative action in the enforcement of state law is aimed principally at the prevention of its violation. To some extent, judicial action may have the same aim, as in the issuance of injunctions, binding persons over to keep the peace, and imposing penalties on some persons in the hope of deterring others from committing the same offense. In criminal matters, however, the function of the courts is primarily retrospective in character. They are principally concerned in the determination of guilt and in the imposition of punishment after the offense has been committed. The exercise of this function by the courts becomes necessary when the preventive measures of administrative authorities fail in keeping the law inviolate. Where additional coercion is necessary in order to secure the enforcement of the law, the courts may be resorted to. For the final enforcement and carrying into effect of most laws where opposition is encountered, court action is usually contemplated. This practice is due in large measure to the prevalent idea that conclusiveness of administrative action would introduce an arbitrary element into the government, and that, even if efficiency should thereby be sacrificed to some extent, judicial review is desirable in order that individual rights may be adequately safeguarded. The courts thus become virtually a part of the administrative machinery for the enforcement of state law, and the degree of efficiency attained by the courts in the performance of their functions thus becomes, from the administrative standpoint, an important question. No matter how efficient the police

may be in making arrests, nor how efficient the administrative officers of the state may be in the performance of the preliminary law-enforcing functions vested in them, if the courts are inefficient or if courts and juries fail to convict in the face of overwhelming evidence, the law will in many cases not be enforced.

While few would go so far as to agree with the wag who paraphrased the definition of a court as a place where justice is dispensed with, it is undeniable that the judicial tribunals of the country, and especially of the states, have of late years been subjected to serious criticism. Thus Governor Noel of Mississippi has declared that "it has been said that laws are made 'to restrain the bad and protect the good.' Even a casual review of the hundreds of criminal convictions in this state reversed for technicalities absolutely foreign to the question of guilt or innocence, creates in many the belief that 'laws are made to protect the bad and restrain the good.' " [1] Although there is a tendency to base wholesale denunciations of the courts upon the magnified importance of exceptional cases where justice has miscarried, it is nevertheless true that justice as actually administered in the state courts is not an adequate expression of the popular will. Many of the technicalities of procedure, such as in the drawing of indictments, seem to be based upon an exaggerated notion of the importance of individual rights in comparison with the general welfare and security of society. The safeguards for individual rights are amplified by such antiquated constitutional provisions as that which grants immunity to a prisoner from giving testimony in his own case. Laxity and feebleness in the enforcement of law through judicial action is further produced by numerous delays in procedure, due to the taking of appeals from one court to another, the reversal

[1] Annual Message of 1910. *Mississippi Senate Journal,* 1910, p. 14. See also Reinsch, *Readings on American State Government,* pp. 173-199.

of lower courts for technical errors, the granting of retrials and of numerous continuances for insufficient reasons. The technical rules of procedure have become a sort of fetish, the maintenance of rights under which is too frequently considered as an end in itself, without regard to whether any substantive right has been abridged. In criminal trials, presumptions and benefits of doubt are almost always decided in favor of the defendant, even though the interests and protection of society at large may be jeopardized. If, in spite of this advantage, the defendant should be convicted, he may appeal from one court to another, provided his purse is long enough, but if he is acquitted any attempt on the part of the prosecution to take similar action is ordinarily blocked by the constitutional restriction relating to double jeopardy.[2] Again, if there is so much local prejudice against a prisoner that he will probably not be able to secure a fair trial, a change of venue may ordinarily be had, while the right of the government to such a change, when the sentiment in favor of the prisoner makes his conviction almost impossible, is considerably more restricted.

Among the most serious difficulties, however, in the way of efficiency in the administration of punitive justice are the requirements of indictment by a grand jury and conviction by unanimous verdict of a petit jury. Although the grand jury may sometimes be useful in compelling the attendance of witnesses and examining them under oath, and in supporting the public prosecutor in proceeding against powerful malefactors, it is nevertheless on the whole an inefficient and cumbersome body composed of untrained and irresponsible laymen. This inefficiency and cumbrousness is shown in the mistakes which the grand jury makes in selecting the cases to be tried and in failing to examine at all many cases in

[2] Though, in a few states, the government may appeal when the verdict is for the defendant on a point of law as distinguished from fact.

which true bills should probably be returned. It is said that, in 1911, the grand jury in Chicago released without a hearing 28 per cent of those held on felony charges.[3] Furthermore, the necessity of waiting for grand jury action is one of the most potent causes of delay in criminal proceedings. A remedy for this condition of affairs has already been found in some states where crimes are prosecuted by means of informations prepared by the prosecuting attorney. This increased power of the local prosecuting attorney, however, should be accompanied by an increased degree of central control over him.

A more serious obstacle, however, to efficient law enforcement through court action is found in the system of trial by jury. The right to trial by a jury of the vicinage is an ancient and immemorial right, held in just veneration by many persons, especially criminal lawyers, but it has now practically outlived its usefulness. The difficulties involved in the jury system arise, first, from the method of selecting juries, and, secondly, from the extent of the powers which they exercise. Juries are still selected from the vicinage, though the reason for the rule has long since disappeared. The original reason for this rule was in order that the jury should be composed of men having personal knowledge of the facts, but now jurors who know the least about the alleged crime are most apt to be selected. As already noted, the defendant may, under certain circumstances, secure a change of venue, but the trial judge should be empowered to allow the same privilege to the prosecution, under equally justifiable conditions, in spite of the objection of the defendant. From whatever locality the jurors may be selected, partisan political considerations should not be allowed to enter into the choice, and, to this end, the selection should be taken out of the hands of the sheriff and vested in an impartial commissioner appointed by the judges or by central authority. Under the

[3] *Journal of Criminal Law and Criminology*, iv, p. 197.

system in which the sheriff draws the grand and petit juries, men are sometimes selected with a view to the protection of offenders having political influence, and not to return indictments or verdicts. In order to remedy this state of affairs, jury commissioners have been provided in some states through judicial selection or appointment by the governor. Thus, Maryland, by an act of 1904, vests in jury commissioners appointed by the governor the power previously possessed by sheriffs to select jurors. Such acts have been held not unconstitutional as an infringement upon the prerogatives of the judiciary.[4]

Even where partisan political considerations have been eliminated, however, it does not follow that an intelligent and capable jury will be selected. In some states the jury panel is drawn by lot or blind chance, and there is no assurance that the least qualified persons in the county may not be selected. Even where character and intelligence are taken into account as far as possible in selecting the panel, the actual trial jury is apt to be composed of persons of but mediocre intelligence and standing in the community. Members of certain professions and persons who would be seriously injured financially by jury service are frequently exempted from that duty, thus eliminating a large proportion of the intelligent and well-to-do residents of the community. This process of elimination is carried a step further through the practice of challenging jurors, either peremptorily or for cause. Persons who have formed some opinion of the case through reading newspaper accounts of it are usually challenged, thus further eliminating the most intelligent class. In this connection it may be noted that the defendant is specially favored by the provision usually found whereby a greater number of challenges are allowed to the defense than to the prosecution.

Not only the method of selecting the jury but also the mode

[4] State *vs.* McNay, 100 Md., 622; Geiger *vs.* State, 25 Ohio Cir. Ct. R., 742.

of its operation after selection places obstacles in the way of the efficient administration of justice. It has frequently been noted that, in our state courts as compared with the English courts or even with the Federal courts, the powers and functions of the judge are of less importance in determining the course of the trial. The judge should not be reduced to a mere figurehead, for presumably his greater experience and discrimination in weighing evidence than any jury possesses should qualify him to serve as a guide and mentor to the jury. The exercise of his normal powers to instruct the jury, to summarize and comment on the evidence and to direct the trial in general should be of great service to the jury in reaching a just verdict, and should remain unimpaired. In practice, however, these normal powers of the state judge are greatly restricted. The impotence of the judge is even further accentuated by the provision found in some half a dozen states, to the effect that juries shall be judges of the law as well as of the facts in criminal cases.

A relic of former times still embedded in the jury system is the rule requiring that the verdict be unanimous. This rule not infrequently causes a trial to miscarry through a failure of the jury to agree, and thus necessitates a new trial with the attendant expense and delay. Except, perhaps, in capital cases, there would seem to be no good reason why juries should not be allowed to reach verdicts by a majority or three-fourths vote, as is already allowed in some states. The unanimity rule makes it especially difficult to enforce the law in those portions of the state in which public sentiment is opposed to the enforcement of the law. This would doubtless also frequently be true so long as the jury system is retained, no matter what the vote required to reach a verdict. "A flagrant example of the 'lawlessness' of jurors in Illinois and of the impotency of judges under such a system to prevent outright nullification of the law was recently afforded in Chicago, where thirteen different juries, in the face

of incontrovertible evidence, refused to convict saloon-keepers for violating the Sunday closing law, thus presenting an example of a complete breakdown in the machinery of law enforcement." [5] We thus have a system of "jury-made lawlessness, which recognizes rights that are forbidden by law and denies rights that are granted by law." [6]

In homicide cases many defendants are acquitted by the jury in the face of overwhelming evidence. It is well known that in lynching cases it is practically impossible to secure convictions by juries. It is difficult in the first place to apprehend members of a lynching party, even though the affair be perpetrated in broad daylight by unmasked men. Coroners' juries empaneled to hold an inquest over the bodies of persons lynched, frequently bring in a verdict that the deceased came to his death at the hands of persons unknown. Often this is the end of the matter, as in the celebrated Frank case in Georgia in 1915. But even if the persons who perpetrated the deed are known and can be apprehended, the attempt to try them by a jury of the vicinage is apt to be a farce. "The case of State *versus* Hughes, charged with participating in a lynching, came up in DeKalb County, Tennessee, in July, 1902, but it was found impossible to get a jury to try the case. The court exhausted a venire of three hundred and fifty, and found every man in the lot disqualified—probably having themselves aided in the affair." [7] In 1912 a negro who had killed a special policeman was burned to death by a mob at Coatesville, Pennsylvania. Fourteen of the alleged lynchers were indicted, seven of them were tried, and the evidence against them appeared to be conclusive, but all seven were found not guilty by the jury, and the prose-

[5] J. W. Garner in *Journal of Criminal Law and Criminology*, ii, pp. 183-184 (1911).

[6] T. J. Kernan, "The Jurisprudence of Lawlessness," *Green Bag*, xviii, p. 588.

[7] Cutler, J. E., *Lynch Law*, p. 255.

cuting attorney thereupon asked for the dismissal of the other seven cases.

The inefficiency of the jury system is thus one of the most serious obstacles in the way of the enforcement of state law. It is recognized by public prosecutors that their success in securing the enforcement of state laws that may be obnoxious to public sentiment in their localities depends upon avoiding jury trials as far as possible. One great cause of the failure to enforce the laws against disorderly houses found on the statute books of nearly every state has been the necessity of depending for convictions upon incompetent and even perhaps corrupt juries. In order to avoid this necessity, former Attorney-General Cosson of Iowa drew up and in 1909 secured the enactment by the legislature of that state of a law which has become known as the Iowa Injunction and Abatement Law, and has since been enacted in a number of states, including Nebraska, Kansas, Minnesota, Wisconsin and Illinois.[8] This law avoids the necessity of a jury trial by substituting therefor the action of the equity branch of the courts. It virtually attempts to secure the enforcement of a criminal law by a civil action, permitting proceedings in equity in the name of the state to abate as a nuisance a building used as a disorderly house, and has been upheld as constitutional.[9]

The action to enjoin and abate the nuisance may be brought by the prosecuting attorney or by a citizen or taxpayer. It has already been considerably used, particularly in Iowa. Its effectiveness consists principally in that, as an equity proceeding, the trial is before a judge instead of a jury, and in that either party has a right of appeal instead of the defendant alone, as in criminal cases. "The justification," says ex-Attorney-General Cosson, "for doing away with the jury system

[8] Illinois Session Laws, 1915, p. 371.

[9] See, for example, State *vs.* Fanning, 147 N. W., 215; State *vs.* Gilbert, 147 N. W., 953, relying on 121 Iowa, 482 and 196 U. S., 279.

in matters of this nature, and seeking the injunctive remedy, a proceeding in equity, is bottomed upon the fundamental fact that the state which passes the law inherently has and ought to have the power to enforce that law. The injunctive remedy gives to the state this right, and no other method has yet been devised which so effectively gives to the state this power to enforce its own statutes, and yet at the same time violates none of the fundamental rights of the defendant." [10]

It remains true, however, that, in spite of the most efficient methods of procedure that may be devised and enacted into law, efficiency in the administration of punitive justice must still depend to a large extent upon the feeling of respect for the law among the people, and upon a high professional standard of morality and ability among the bench and the bar. This subject has recently been investigated by an able committee for the National Economic League, and their conclusion is that no panacea is to be found for inefficiency in the administration of justice. They recommend "(1) proper training of the legal profession; (2) giving the bar greater influence in the selection of judges so as to insure expert qualifications in those who are to perform an expert's function; (3) unification of the judicial system and more effective and responsible control of judicial and administrative business; (4) giving power to the courts to make rules of procedure and thus giving the courts power to do what we require of them; (5) improvement of legislative law-making both in substance and in technique; and (6) thorough study of the new problems which an industrial and urban society has raised and of the means of meeting them with the jural materials at hand." [11]

The control of the judiciary over the administration some-

[10] See "The Iowa Injunction and Abatement Law," U. S. Senate Doc. No. 435, 62d Cong., 2d Sess., 1912; also pamphlet with same title published by the American Vigilance Association, New York.

[11] "Preliminary Report on Efficiency in the Administration of Justice," prepared for the National Economic League, by C. W. Eliot, M. Storey, L. D. Brandeis, A. J. Rodenbeck, and Roscoe Pound.

times operates to enfeeble the instrumentalities provided for the enforcement of law. The power of the courts to issue injunctions may be used not only to secure the enforcement of law by abating a nuisance, but it may also be used in such a way as virtually to paralyze the executive arm of the government in moving against the violators of law. Administrative boards are enjoined from slaughtering infected cattle. In spite of an anti-tipping law, the head of the "tipping trust" continues to collect tips under the protection of an injunction prohibiting hotels and restaurants from canceling his contracts with them. Police officers are enjoined from raiding notorious establishments or from preventing palpable violations of the law. Thus, an internal conflict takes place among different agencies of the government which should work together in effective coöperation in law enforcement. This situation is merely one of the manifestations of the overemphasis upon law and individual rights as contrasted with administrative efficiency and the welfare of society. There is a "common-law distrust of administration, which results in putting upon criminal law much that is purely administrative, for which its methods and machinery are ill-adapted. The two rival agencies in government are law and administration. Administration achieves public security by preventive measures. It selects a hierarchy of officials to each of whom definite work is assigned, and it is governed by ends rather than rules. It is personal. Hence, it is often arbitrary and is subject to the abuses incident to personal as contrasted with impersonal or law-regulated action. But well exercised, it is extremely efficient; always more efficient than the rival agency can be. Law, on the other hand, operates by redress or punishment rather than by prevention. It formulates general rules of action and visits infractions of these rules with penalties. It does not supervise action. It leaves individuals free to act, but imposes pains on those who do not act in accordance with the

rules prescribed. It is impersonal, and safeguards against ignorance, caprice or corruption of magistrates. But it is not quick enough or automatic enough to meet the requirements of a complex social organization." [12]

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[12] Roscoe Pound, "Inherent and Acquired Difficulties in the Administration of Punitive Justice," *Proceedings of the American Political Science Association,* iv, pp. 232-233.

CHAPTER XVIII

NEWER FUNCTIONS

The process of centralization in state administration has proceeded along two lines. First, functions formerly exercised by the localities have been taken over by the state, or, if left primarily with the localities, have been placed under the supervision of the state; and, secondly, the state has assumed functions not previously exercised by any governmental authority. Although some of the functions previously exercised by the localities have recently been assumed by the states or brought under state supervision, most of the newer state functions fall in the second of the two classes enumerated. The assumption by the states of the second class of functions is due in large measure to the rapid rise, since the Civil War, of new and complex industrial conditions and economic phenomena. Among the more important of these newer state functions may be mentioned the control of corporations, particularly public service corporations, the regulation of the conditions of labor in industrial enterprises, the construction of public works, and the promotion of good roads, of agricultural interests, and of the conservation of natural resources. The tendencies toward state control or supervision in respect to some of these functions are described in the following extracts:

SUPERVISION OF CORPORATIONS

"Most of the states have provided for the administrative control of corporations by means of a number of separate offices and bureaus, as in Illinois. The registration of new

corporations is usually under the secretary of state. Every state has a banking and insurance office. In most of the larger states, there are separate bank and insurance commissioners; but in a number of the states the functions of one or the other of these offices are attached to one of the older classes of elected state officers,—as the auditor, secretary of state, or state treasurer.

"Nearly all of the states have also established one or more boards for the control of railroads and often of public utilities. Massachusetts had for a time three commissions for different classes of public utilities,—railroads, lighting plants, and telephone and telegraph companies. New York State has two public utility commissions, one for New York City and the other for the remainder of the state. But some twenty states now give a large power of regulation and control over all or most classes of public utilities to a single commission, —as the Railroad Commission of Wisconsin, the Public Utility Commission of Illinois, and the Corporation Commission of Oklahoma.

"In Virginia and North Carolina, the public control of corporations of all kinds has been more thoroughly concentrated in the hands of a single corporation commission in each of these states. The Virginia Corporation Commission was created by the State Constitution of 1902. It consists of three members appointed by the governor, subject to confirmation by the general assembly in joint session, for terms of six years, one member retiring every second year. The constitution provides that this commission is the department of government for the creation, visitation, supervision, regulation, and control of corporations chartered by or doing business in the state. The constitution further provides, in considerable detail, for the authority of the commission over transportation and transmission companies, including the power to prescribe rates; and for the administrative procedure before the commission and for judicial review of its

decisions. By the constitution and statutes, the commission is also made a board of tax assessors for certain classes of transportation and transmission companies.

"It is further provided by the Constitution of 1902 that banking and other bureaus may be established within the department of the state corporation commission. In 1906 a bureau of insurance was established under the supervision and control of the corporation commission; but the commissioner of insurance is elected by the general assembly for a term of four years. This bureau issues licenses and certificates of authority to insurance, guaranty, trust and insurance companies; it receives reports and has power to make examinations. It also receives reports of fires, and makes investigations into the causes of fires. Since 1907 the corporation commission has received financial statements from state banking institutions. In 1910 the commission was given power to appoint a bank examiner and assistants, who make at least an annual inspection of state banking institutions, and of national banks which are state depositaries." [1]

PUBLIC SERVICE COMMISSIONS IN THE UNITED STATES

Public utility commissions are the instruments used by many states for the regulation of one of the most important classes of modern industrial enterprise. The growth and extension of these commissions among the states is thus described:

"State administrative control of urban utilities began in 1885 with the creation of the Massachusetts Board of Gas Commissioners, changed two years later to the Board of Gas and Electric Light Commissioners. This experiment was not the result of widespread popular demand: The act estab-

[1] M. H. Robinson, in *Report of the Efficiency and Economy Committee of Illinois*, pp. 745-746.

lishing the commission was lobbied through the General Court by the Boston Gas Company as a strategic move in its memorable struggle with J. Edward Addicks. Notwithstanding this somewhat unsavory origin the Board has had an honorable career of public usefulness and has exercised an important influence, by way of example, upon the development of urban utility control in other states.

"In addition to its Light Commissioners, Massachusetts has a Railroad Commission with some jurisdiction over street railways, and a Highway Commission which in 1906 was given a lmited control over telephone companies. But the earliest commissions with wide powers embracing all urban utilities were established almost simultaneously by New York and Wisconsin in 1907.

"In New York State a Board of Railroad Commissioners, a Commission of Gas and Electricity, an Inspector of Gas Meters, and a Rapid Transit Board had all and severally failed to prevent overcapitalization or effectively control the rates or service of municipal monopolies. The several boards, in fact, had proven quite innocuous—partly by legislative intent, partly because of weak personnel. Their jurisdictions, moreover, were overlapping and to some extent conflicting, their powers feeble and feebly exercised, and their machinery at once cumbersome and inadequate. Meanwhile Messrs. Whitney, Ryan, Belmont, and other exponents of high finance were making plain to the meanest intelligence the evils of uncontrolled monopoly. At length, under the leadership of Governor Hughes, the futile regulative bodies were swept away and in their stead were installed two public service commissions—one for Greater New York, and one for the rest of the state.

"In Wisconsin, also, the legislative conscience was quickened by flagrant abuses—especially in the principal city of the state. Effective control of public service corporations was, moreover, a prominent feature in the comprehensive program

of social reconstruction for which La Follette and the State University were joint sponsors. A Railroad Commission, clothed with plenary powers, was created in 1905 over bitter opposition; and two years later its jurisdiction was extended to urban monopolies of every description. The Public Utilities Act of 1907 was drafted by Professor John R. Commons of the State University of Wisconsin in consultation with Mr. Halford Erickson and Professor B. H. Meyer of the Railroad Commission. The Wisconsin statute concededly is one of the best drawn, as well as one of the most effective laws of its kind, and has served as a model for similar legislation in a number of states.

"Following the example of New York and Wisconsin, public service commissions were established by Georgia in 1907, by Vermont in 1908, by Maryland and New Jersey in 1910, by California, Connecticut, Kansas, Nevada, New Hampshire, Ohio, and Washington in 1911, and by Rhode Island in 1912. In addition to these Oklahoma, by the State Constitution of 1907, provides for a Corporation Commission with some jurisdiction over public utilities, and Oregon, in 1911, enacted a Public Utilities Law, subject to referendum at the November, 1912, election. Thus legislation looking to central administrative control of urban utilities has been enacted by seventeen states, including five New England, three Middle Atlantic, one South Atlantic, three North Central, one South Central, one Rocky Mountain, and three Pacific Commonwealths. A legislative movement so widespread and of such recent and rapid growth challenges the most serious consideration.

The Commissions

"The commissions, except in Georgia, Oklahoma, and Oregon, are appointive, generally by the governor and senate; and in most cases the governor has also the power of removal for cause. The number of commissioners is five in

California, Georgia, and New York, and three in the other states. Terms vary from three to six years—the longer period predominating. Salaries range from $1,700 in Vermont to $15,000 in New York—$4,000 to $6,000 being the prevailing amount. In Georgia only the chairman is paid, and in six other states the chairman receives a higher salary than his colleagues. In most cases commissioners are required to devote their entire time to the work and are forbidden to own any interest, direct or indirect, in public service businesses or to engage in any pursuit incompatible with their office.

"Wide differences appear in the financial support accorded to public service supervision in the several states. The commissions of Georgia, Nevada, New Hampshire, Rhode Island, and Vermont are so hampered by niggardly appropriations as to be necessarily ineffective. On the other hand, the two New York commissions are generously treated by the legislature: not only are there ten commissioners at an aggregate salary of $150,000, but there is abundant provision for expert service and for research and library facilities. The Wisconsin, Washington, and Ohio commissions are likewise liberally, though not lavishly, supported.

Utilities Included

"Telephone companies are subjected to commission control in each of the seventeen states, street railways save only in Nevada (where none exist), gas and electric companies in all but Oklahoma, and water companies except in Georgia, Massachusetts, New York, Oklahoma, and Vermont. Heating companies are specifically mentioned in eight of the acts, wharves and warehouses in two, refrigerating and sewerage companies in one each. In most cases, railways, and generally other carriers as well, are under the jurisdiction of the same commission as urban utilities. In California, Georgia, Oregon, and Wisconsin the new duties were added to those of existing railroad commissions; in Kansas and Ne-

vada the old commissions were given new names as well as broader jurisdiction; in Connecticut, New Hampshire, New Jersey, New York, Ohio, Rhode Island, Vermont, and Washington, the old boards were abolished and their powers transferred to public service commissions; lastly, in Maryland and Oklahoma the public utilities commissions were created outright. Only in Massachusetts is the supervision of public service corporations divided.

Powers and Duties of the Commissions

"The keynote of the acts under review is *administrative* as distinguished from legislative or judicial control. Accordingly, it has been sought to create independent tribunals of great power and dignity, clothed with ample discretion in the discharge of the important duties intrusted to them, and freed so far as possible from judicial or political control. The several commissions differ much in the thoroughness with which these principles have been carried out, and their effectiveness will be found to vary pretty directly with the degree of approximation to the ideal above suggested.

Inquisitorial Powers

"Regulation by commission has been happily styled 'the method of intelligence.' Public service companies have no legitimate business secrets, since they have no competitors to fear and nothing to conceal unless it be some practice contrary to the public interest. Extortionate profits, stock watering, rebates, discrimination, and political 'deals' flourish in secret but cannot stand the light of public knowledge. Hence regulative bodies, from the creation of the Massachusetts Gas Commission to the present day, have found publicity a most potent means of control. Accordingly, all public service commissions nowadays are given authority to summon witnesses, compel testimony, and enforce the production of books and papers. In a word, they are granted power to

make searching inquiry into any transaction affecting the public interest. Annual reports in great detail also are usually required from public service corporations. What is even more important, most of the commissions are empowered to supervise accounts and to make valuations of utility properties through their own staffs." [2]

LABOR LEGISLATION

"The tendencies of labor legislation in other states have been toward (1) centralization of administration in the hands of one bureau or department, (2) a greater degree of flexibility in the labor legislation itself, and (3) a closer cooperation between employer and employee in the enforcement of labor laws.

"(1) Effective administration cannot be expected from a series of independent offices, with conflicting powers. Wisconsin, in 1911, established an industrial commission and placed the administration of all labor legislation in the hands of this commission. Ohio, in 1913, adopted a similar plan. New York and Pennsylvania have to a large extent centralized the administration of labor legislation.

"(2) The policy in this country until recently has been to enact statutes which attempt to cover in detail every contingency that may arise in connection with the guarding of machinery etc. It is impossible to cover all such details in a statute, and to change statutory provisions quickly so as to adjust them to changing industrial conditions. The situation is much the same as that which prevailed some years ago with reference to the fixing of railroad rates. Legislatures have now realized that it is impossible to regulate rates in detail by statute, and have committed this task to permanent commissions, laying down in the statute the general principles under which the commission should act.

[2] E. H. Downey, in *Iowa Applied History Series,* i, pp. 144-153.

"The New York State Factory Investigating Commission said in its report in 1913: 'The labor law is framed on what we believe to be a mistaken theory, that the requirements for the protection of the health and safety of workers should all be expressed within the four corners of the statute itself. The attempt to carry out this theory has led to the enactment of provisions so specific and rigid in their requirements as to make their enforcement, in many cases, unjust or even impossible. They fail to take into account the varying conditions in different industries. In some instances where the impossibility of setting a rigid standard for all cases was manifest, the provisions of the law were made so vague and indefinite that their meaning or application could not be determined at all, or had to depend upon the exercise of an administrative discretion, a one-man discretion, so arbitrary in character and so calculated to work injustice, that it was either not exercised at all, or, when exercised, became a natural subject of distrust on the part of the courts. We believe that the only way of obtaining a labor law which can be enforced, is to abandon the theory underlying the labor law as it now stands; namely, that it is possible in any statute to provide specifically the measures to be taken for the protection of the lives, health, and safety of workers in each industry and under all conditions. We are of opinion that the legislature should make broad and general requirements for safety and sanitation, setting forth where practicable minimum requirements, and delegating to some responsible authority the power to make special rules and regulations to carry the provisions of the statute into effect in the different industries and under varying conditions.

" 'These rules and regulations should be collected in an industrial code that could be enlarged or changed with comparative ease from time to time as occasion might require. Such a principle is approved by all those who have given time or study to this important subject.'

"In 1913 the New York legislature put this recommendation into effect; and the New York example was immediately copied by Pennsylvania. Massachusetts and California, in 1913, adopted a similar principle. Wisconsin, through her industrial commission law in 1911 (largely copied by Ohio in 1913), set the standard for legislation of this type. Rules for industry were to be made by the industrial commission after a hearing and were to be reviewable on appeal to the courts under certain conditions. There is no arbitrary power and every legitimate interest is properly safeguarded.

"Several plans of organization are possible, if the labor bureaus are to be consolidated, and if a wide power to make rules and regulations is vested in the consolidated department. Upon this subject the following quotation from the report of the New York commission is of interest:

" 'To give one man, namely the Commissioner of Labor, the power to make rules and regulations, would be entirely out of the question. This power is too great to intrust safely to any one individual. Two other methods were suggested: (1) to create a commission at the head of the Department of Labor in place of the present single commissioner, with power to make rules and regulations and to enforce them, and (2) to create a board within the Department of Labor to make rules and regulations, and to leave the Commissioner of Labor at the head of the department as at present, with full power to enforce the provisions of the statute and the rules and regulations adopted by the board, and with full responsibility for their enforcement.

" 'The Commission has carefully considered the advantages and disadvantages of each plan. We have found that there are advantages and disadvantages in each, but after careful study we have decided that the second alternative is the one likely to produce better results in the state. In reaching that conclusion we were guided by the following principles:

"'1. Responsibility for enforcement of law must be definitely located.

"'2. Administrative work can best be done by one man.

"'3. Questions involving discretion and requiring deliberation are best decided by a body of men.

"'The plan we propose has the deliberative advantages of commission government, and the administrative advantages of a single head. The formation of a board to make, with due deliberation, regulations that shall carry into effect the intent and purposes of the law, will secure for the department all the benefits of a commission; and the retention at the head of the department, of a single commissioner to enforce the law and the regulations adopted thereunder, will prevent any shifting of responsibility.

"'The question has arisen, whether this board shall be merely advisory and its conclusions subject to veto by the Commissioner of Labor. We believe, however, that such veto power would not produce good results. Nevertheless, the Commissioner of Labor should not be placed in a subordinate capacity, but should be chairman of this board and thus have an important voice in framing the rules and regulations upon which the successful administration of his department so largely depends.'

"There are four possible plans of organization: (1) The Wisconsin plan, where the executive administration, as well as the framing of rules, is placed in the hands of a commission of three members. This plan is open to the objection that it scatters administrative responsibility for the work of the department. (2) The plan of creating a board by associating with the head of the department of labor several advisory members who do not give their whole time to the work of the board. Advisory boards, performing only occasional services, have not in general proven satisfactory. (3) The plan of creating a board by associating the chiefs of the several labor bureaus with the head of the labor de-

partment. This plan has advantages, but is open to the objection that it confers independent advisory and discretionary functions upon officers who are administratively subordinate to the head of the labor department. (4) The plan of associating with the head of the department two deputies, who should be free from administrative duties but devote their whole time to the work of the department, the three to act as a board for matters requiring discretionary action. It may be objected to this plan that it proposes the appointment of two important officers who would have very little to do. Yet these deputies would have enough to do if they (a) acted as part of a board in compensation cases, in passing upon matters affecting private employment agencies, and in arbitration matters (b) conducted investigations and hearings upon matters affecting labor; and acted in obtaining cooperation by employers and employees in drawing up rules applicable to particular industries; (c) acted as a part of the board in adopting rules and regulations. A more serious objection is the one that friction may result from having two officers exercising independent powers by the side of the head of the department of labor; yet the possibility of friction is hardly as great as under the Wisconsin plan.

"In order to control more effectively power granted to a commission to make rules, the General Assembly in conferring such power may properly (1) fix in important matters certain maximum or minimum standards limiting the authority of the commission; (2) require that rules made by the commission be submitted at the next succeeding session of the General Assembly. Rules thought improper by the General Assembly could then be repealed.

"(3) The enforcement of safeguards in industry must depend primarily upon the employer and employee rather than upon state inspection. An inspection force, no matter how large, cannot enforce in detail all requirements now imposed by labor legislation in Illinois. Under the Wisconsin

Industrial Commission law, an effective administration has been made possible by the fact that committees of employers and employees have been appointed for each industry to work out safety rules for that industry. The framing of such rules has been in itself an education regarding the need for the rules framed. But such coöperation between employer and employee cannot be obtained without some degree of centralization in the enforcement of labor laws, and some flexibility in the rules to be framed." [3]

THE PROMOTION OF AGRICULTURE

"In twenty-two states there are organized agricultural departments, in which are united a considerable number of services. In this class are New York, Pennsylvania, Ohio, Maine, New Hampshire, North Dakota, Montana, Idaho, Washington and nearly all of the Southern States.[4] In most of these states the department is under the direction and control of a single salaried official usually styled the Commissioner of Agriculture. In many of the Southern States, and in North Dakota, the commissioner is an elective state officer, in some cases provided for in the state constitution. In the other states this officer is appointed by the governor. Some of these states with well organized departments of agriculture have, in addition to the chief executive, a board of agriculture, usually small in number and appointed by the governor. Such boards are provided in Pennsylvania, New Hampshire, Virginia, North Carolina, Kentucky, Alabama and

[3] W. F. Dodd, in *Report of the Efficiency and Economy Committee of Illinois,* pp. 563-567.

[4] In most of these states the department title and functions include more than agricultural interests. In Alabama it is a department of agriculture and industries; in Mississippi, a department of agriculture and commerce; and in Arkansas a department of mines, manufactures and agriculture. In Iowa there is a so-called "department" of agriculture under a state board of agriculture, organized as in Illinois and with limited powers.

Louisiana. In Ohio there is a comprehensive department of agriculture under the control of an agricultural commission of four members, three appointed by the governor and one by the trustees of Ohio State University, at salaries of $5,000, with extensive powers. In Oklahoma there is a state board of agriculture of eleven members, the president of which is an elective official.

"In the larger number of states, agricultural interests are looked after, as in Illinois, by a number of different authorities, organized in different ways and with different relations to the state government. Most of these states have a state board of agriculture, which is usually a large body of from ten to more than forty members, which is neither selected by nor responsible to the governor or other state officers. In a few states (Delaware, West Virginia, South Dakota and Oregon) there are small boards of agriculture (with from three to seven members) appointed by the governor, with limited powers. There are no state boards of agriculture in Wyoming, Utah, Nevada, New Mexico or Arizona. But in all of the states of this group there are other officials and boards exercising functions relating to agricultural affairs, such as live stock, dairy, fish and game and forestry boards or commissioners. The state boards of agriculture are usually limited to the management of the state fair, the collection of statistics, the publication of bulletins and crop reports, and sometimes supervision of farmers' institutes, the inspection of commercial fertilizers and some similar matters. In general, their functions are more of an educational character than governmental, since they are rarely charged with the enforcement of legislation relating to agriculture and other related industries.

"The chief advantages claimed for the board system are that it affords a means of securing the collaboration of a number of persons who are actively engaged in the pursuits of agriculture and whose combined experience and knowledge

may therefore be presumed to be much greater than that of a single commissioner. The chief disadvantage, however, is that owing to the large size of most state boards of agriculture they are cumbersome and unwieldy and therefore not well adapted for efficient administration. Where there are twenty (20) or thirty (30) members residing in different parts of the state they can be assembled only at rare intervals and then at more or less inconvenience and expense. Finally, boards as administrative bodies lack responsibility, since it is obviously difficult to fix definitely and effectively responsibility for their acts upon any member.

"It should be said, however, that the difference between the single commissioner system and the board system is sometimes more apparent than real. In all the states which have a state board of agriculture, the president or the secretary —usually the secretary—is generally a paid official who maintains an office in the state capitol and devotes most of his time to the discharge of his official duties. In most states he performs various duties which, in those states having departments of agriculture, are performed by the commissioner. His office, therefore, is often not very unlike a department and is in fact so designated by law in several states (of which Illinois is one) where there are state boards of agriculture. But in such cases the secretary of the state board of agriculture is subject to the control and supervision of the board, whereas a commissioner of agriculture is directly responsible for the conduct of his office.

"It is not to be understood that there are no other authorities in these states which have departments of agriculture. In a majority of states the control of the live stock interests is under a separate board or commissioner, entirely independent of the commissioner of agriculture or the state board of agriculture, as the case may be. So with regard to the protection of game and fish, the control of the dairy industries, food inspection, the forestry service etc. In most states

the board of agriculture, or the department of agriculture, is therefore but one of a group of independent and coördinate authorities among which is distributed the administration of a number of related services.

"In many states the number of such boards or commissions has been multiplied to such an extent as to cause much unnecessary confusion, overlapping and duplication. In Utah and Washington, for example, practically each service relating to agriculture and other kindred industries has been placed under a separate board or commission, and to a somewhat less degree this is the situation in Illinois and many other states.

"It is the opinion of students of administrative organization that the board system has been much overdone in most of the states, and that considerations of economy, efficiency and responsibility require that the further multiplication of boards for administrative purposes should be checked. In recent years there have been signs of a reaction against this tendency. New York, Pennsylvania, Ohio, Washington, and to a less extent Florida and Georgia have gone farthest in the direction of consolidating in a single department the various agricultural services, which are more or less related in character, with a view to introducing simplicity, securing greater economy and efficiency and avoiding unnecessary overlapping and duplication. In 1913 such consolidated departments were established in Ohio, New Hampshire and Washington.

"The New York system represents the type of organization most in harmony with modern principles of administrative organization, and the one toward which the most progressive states are gradually tending. The commissioner of agriculture in that state has been vested with large powers and in the department of which he is the head have been consolidated a large group of important services organized into ten bureaus, such as the supervision of dairying and cheese

making, the administration of the laws relating to the live stock industry, including the control of contagious diseases among domestic animals, the bee keeping industry, the enforcement of pure food laws and laws relating to the sale of certain articles like Paris green, turpentine, linseed oil etc., the laws for the protection of trees, shrubs and plants against disease and pests, the laws governing the inspection and sale of commercial fertilizers and food stuffs, the inspection and condemnation of meat, and other services which in most of the states are under the administration of separate boards or offices.

"So too in Pennsylvania the department of agriculture is charged with the promotion of agriculture, horticulture, forestry, live stock and poultry interests, the analysis of fertilizers, the protection of forests, the enforcement of laws relating to diseases of animals, the prevention of fraud in the sale of foods, and supervision over the Live Stock Sanitary Board, the State Veterinarian, the Economic Zoölogist and the Dairy and Food Commissioner.

"Even more comprehensive are the powers of the recently established Agricultural Commission of Ohio. These include the powers formerly exercised by the Secretary and State Board of Agriculture, the Board of Live Stock Commissioners, the Board of Control of the State Experiment Station, the State Dairy and Food Commissioner, the Fish and Game Commissioner, the State Board of Veterinary Examiners, and some powers of the State Board of Pharmacy. The commission has authority to establish bureaus, and also has power to conduct investigations, inspections and hearings and to make rules and regulations relating thereto.

"The consolidated department of agriculture under a single official, with subordinate bureaus and divisions, is the system of organization by which the Government of the United States administers the acts of Congress for the promotion of agriculture. This also is the usual method of administration for agri-

cultural as for other interests in Canada and the other countries in America and Europe." [5]

THE PROMOTION OF GOOD ROADS

"In 1891 the state of New Jersey inaugurated what has proven to be a new general movement for building improved roads in the United States, with the aid of state appropriations and more centralized methods of administration. The New Jersey Act of this year made an annual appropriation of $75,000, to be used in road work, under the supervision of the state board of agriculture. Two years later (1893) a Massachusetts law created a state highway commission, and provided for the establishment and construction of state roads. In the same year an Indiana law provided for the building of free gravel roads by the county authorities; and laws authorizing county roads were also passed in New York, New Jersey, Michigan, Missouri, Oregon and Washington. In 1895 Connecticut and California enacted new road laws, for state roads to be built under the supervision of state highway officials. In 1898 two important state aid laws were enacted in New York state; and Maryland established a highway division of the state geological survey to investigate road conditions and methods of improvement.

"Since 1900 new road laws have been passed in most of the other states, and additional legislation in a number of the states already mentioned, establishing or extending the powers of state highway officials and making or increasing state appropriations for road purposes; while in New York, California and several other states large issues of state bonds have been authorized for road purposes. This recent legislation presents a complex variety of provisions exhibiting a wide range of differences in the forms and amount of state

[5] J. W. Garner, in *Report of the Efficiency and Economy Committee of Illinois*, pp. 623-625.

aid and in the organization and powers of state and local officials.

"Forty states have now provided for a state highway department, a state highway commissioner or board, a state engineer, or some other official or board with some power and authority in highway matters. The only exceptions are Indiana, West Virginia, South Carolina, Georgia, Florida, Mississippi, Arkansas and Texas. All of these are in the South except Indiana, where a large amount of road improvement has been carried out by the boards of county commissioners.

"The organization of these state highway offices show a wide variety; and hardly two states have precisely the same system of state highway administration. A number of states have a single state highway commissioner or engineer, usually appointed by the governor (in most cases with the consent of the senate), at the head of this service. This arrangement is established in Maine, Vermont, Connecticut, Pennsylvania, Ohio, Michigan, Kentucky and Oklahoma. More often a board or commission of three or more members is appointed by the governor and senate; and this board appoints an engineer. This plan is adopted in Massachusetts, Connecticut, Maryland, Tennessee, Illinois, Minnesota and Colorado.

"In other states there is a board composed in whole or in part of *ex officio* members, as in New York, New Jersey, Virginia, North Carolina, Alabama, Wisconsin, Idaho, Utah, New Mexico, California and Washington. Thus in New York, the state commission of highways is composed of the state superintendent of highways, the state engineer and surveyor and the state superintendent of public works. In New Jersey the state highway commission consists of the governor, president of the senate, speaker of the house and commissioner of public roads. In Missouri the state highway engineer is appointed by the state board of agriculture; and in Iowa and Kansas the state highway engineers are appointed

by the state agricultural colleges. In North Carolina the office is connected with the state geological and economic survey; and in Louisiana the highway department is one division of the state board of engineers.

"The powers and jurisdiction of these state highway offices cover a wide range of variation, and in no two states is the scope of activity precisely the same. In some states the highway bureaus simply collect and distribute statistical data and other information in regard to road improvement and administration. Other powers added in various states include the direction of experiments in road improvement, the preparation of plans and specifications for bridges and permanent roads, the supervision over the construction of local roads and bridges (built by counties and in New York also by townships) aided by state funds, and the construction and maintenance of a state system of main roads. In a general way, the authority of the state highway officials varies with the amount of state aid.

"In about twenty states the state highway officials not only collect and distribute information and prepare plans and specifications, but also exercise a substantial amount of supervision or direct control over the construction of improved roads and bridges aided to some extent by state funds. These states include: Maine, New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania in the northeast; Virginia, West Virginia, Alabama and Louisiana in the south; Ohio, Michigan, Wisconsin and to some extent Illinois in the middle west; and Colorado, Idaho and California in the farther west. The state departments with the most power are in those states where the state appropriations have been the most important, viz: Massachusetts, Connecticut, New York, New Jersey, Pennsylvania and California.

"The Massachusetts Highway Commission, of three salaried members, appointed by the governor and council, collects and publishes statistics as to roads, makes road maps, gives

advice to local road authorities, and has full control over the system of state highways—including their location, plans and specifications, the acceptance of bids and the work of construction. The commission also registers motor vehicles, licenses operators and makes regulations for their operation; and further has general supervision over telephone and telegraph companies.

"The New York Highway Commission consists of the state superintendent of highways and the state superintendent of public works, appointed by the governor and senate, and the state engineer and surveyor, an elective officer. This commission has an extensive scope of authority. It compiles and publishes highway statistics, investigates methods of road construction and maintenance, and holds annual public meetings in each county or district in the state; it has general supervision over all highways and bridges constructed or maintained, in whole or in part, by the aid of state funds; it prescribes rules relating to the duties of division engineers, district, county or town superintendents of highways in respect to state and county roads; it aids local road officials in establishing grades and drainage systems; it prepares plans, specifications and estimates on the request of local officials; and it approves and determines the final plans and specifications for state and county highways and lets contracts for such improvements." [6]

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PART IV

CONCLUSION

CHAPTER XIX

THE REORGANIZATION OF STATE ADMINISTRATION

The American people have heretofore for the most part been seemingly content to settle the general principles of their state governments in the constitutions and to elaborate details of substantive law in the statutes, without making adequate provision for the enforcement of such constitutions and statutes and without taking sufficient account of the problem of efficient administration. The development of the state administrative organization has for a long time past been largely unconscious and consequently haphazard. Endless incongruities and absurdities were the natural result. Where improvements in organization occurred they were usually accidental, partial or sporadic. The present organization of state administration contains little evidence of unified design or systematic planning. It consists of a complicated mass of separate and disjointed authorities, operating with little reference to each other or to any central control. This situation is due in part to the desire of political "experts" to keep the government complicated so as to weaken popular control, and, in part, to general popular ignorance of the importance of efficient administration. There are, however, signs of an awakening from this condition of complacent inertia. The realization of the need for preparedness for war has been accompanied by a growing perception of our unpreparedness for performing efficiently the important functions of government in time of peace.

The feeling has developed within recent years that, if any systematic improvement in state administrative organi-

zation is to be made, it must be based upon careful investigation of existing conditions and upon patient analysis of the causes of present evils. As a result of such investigation and analysis, constructive measures may be adopted providing for such a reorganization of the various state departments, bureaus, boards, and commissions as may be conducive to a more efficient and economical management of the state's business. To this end many governors, in their messages, are advocating constructive measures looking towards radical changes in state government and administration. Already, preliminary steps have been taken towards the formation of an investigational basis for such a reorganization through the creation of efficiency and economy commissions in various states, notably in Illinois, Massachusetts, New Jersey, Pennsylvania, Maryland, Minnesota, Nebraska, Iowa and Connecticut. Some of these bodies are intended to be more or less continuous and permanent, others were created for mere temporary purposes. Some are undertaking merely to bring about improvements in administrative methods and the details of administrative procedure, others are looking towards a thoroughgoing reorganization of state administrative agencies along broad lines.

Most of the efficiency and economy commissions have confined themselves to recommending such changes in state administrative organization as might be effected through statutory enactments. Their recommendations aim at securing greater concentration of power and responsibility through the consolidation of the numerous state bureaus, departments, boards and commissions and a regrouping of the administrative services. The Illinois commission, for example, recommended the grouping of such services into ten principal departments, namely, finance, education, law, trade and commerce, labor and mining, health, agriculture, public works, charities and corrections, and military affairs. Recommendations are also made for a more effective correlation of state

revenues and expenditures and a more unified control over appropriations. Comparatively little positive advance in the development of an efficient administrative organization has yet been made as a result of the recommendations of the efficiency and economy commissions. Here and there, however, partial improvements have been made. In New Jersey, for example, "laws were passed providing for the creation of the departments of conservation and development, commerce and navigation, taxes and assessment, and shell fisheries. Under these departments are grouped services which have heretofore been performed by six, four, two, and seven separate administrative agencies, respectively." [1] "Furthermore, in order to promote efficiency in the engineering work of the state and to avoid duplication, it was provided by law that there should be a monthly meeting of executive officers representing the departments of public roads, public utilities, motor vehicles, conservation and development, commerce and navigation, taxes and assessment, together with the state architect and the representatives of such other departments, boards, and bureaus as the governor may direct." [2] "Such meetings may prove beneficial in promoting coöperation of the various state departments with each other and with local authorities, and may possibly serve as the first step towards the further consolidation of some of the more closely related departments represented at the meetings." [3] In a number of other states there has also recently been effected partial reorganization of state administration through the consolidation of disjointed but germane agencies, particularly in the fields of education, charities and correction, agriculture, labor and finance.

The movement toward the reorganization of state administration is impeded by the difficulty of state constitutional

[1] New Jersey Session Laws, 1915, Chs. 241, 242, 244, 387.
[2] *Ibid.*, Ch. 190.
[3] *American Year Book*, 1915, pp. 212-3.

amendment. In many states a faulty organization of the administration is so crystallized in the organic law that thoroughgoing reorganization is practically impossible without constitutional change. Minor improvements short of organic revision may produce an increased economy and efficiency in administration, but cannot produce a far-reaching effect so long as the fundamental organization is defective. Radical changes are unwise unless supported by an educated and intelligent public opinion. The development of such an educated public opinion in favor of radical changes in state government is a slow process, because it is necessary for the people to rid themselves of some venerable ideas and traditional notions, such as allegiance to the principles of separation of powers and checks and balances, the undue application of which to the state governments has given us what has been called the "political science of negation." The underlying conservatism and lack of political imagination of the American people is well illustrated by their failure as yet to effect any radical changes in the administrative organization of their state governments in the face of their demonstrated inefficiency.

One of the obstacles to efficient administrative organization in many states is the practice of electing the heads of the older executive departments by popular vote. But the introduction of the short ballot, with the accompanying greater concentration of executive power and responsibility, is usually impossible without constitutional change. The New York Constitutional Convention of 1915 made a proposal for the introduction of a modified short ballot plan, but it failed of ratification at the polls. The constitution proposed by the Convention also contained a scheme of administrative reorganization, whereby all the civil administrative services and functions of the state, now performed by nearly one hundred and fifty separate departments, boards, bureaus, and officers, would be grouped into the following seventeen departments:

law, finance, accounts, treasury, taxation, state, public works, health, agriculture, charities and correction, banking, insurance, labor and industry, education, public utilities, conservation, and civil service. The legislature was required to provide by law for the appropriate assignment of all civil administrative functions to the above departments. Every such function would have to be grouped under one of these heads, as no additional departments could be created by legislative enactment. In most cases the heads of departments were to be appointed by the governor and hold during his pleasure. Although a more efficient organization might probably have been secured by still further consolidation and fuller control by the governor over the various departments, nevertheless this plan, by greatly reducing the number of separate departments and placing them under the more immediate control of the governor, would undoubtedly form a more efficient organization of the state administration than that which now exists.

Even though the heads of all the existing departments were placed completely under the control of the governor by granting him the powers of unconditional appointment and summary removal, he would still not be sufficiently argus-eyed to watch over one hundred departments. Consequently, a reduction in the number of separate state agencies is necessary for effective central control over them, as well as for their proper interrelation and coöperation. With such effective central control, the heads of the executive departments could be formed into a body of advisers to the governor upon the analogy of the cabinet officers in the National Government. Furthermore, the control of the governor over the state administration should be strengthened either by the transfer from local to state officers of functions connected with the enforcement of state law or by vesting in the governor a larger power of control over such local officers.

No preconceived ideas or outworn formulas of govern-

ment should be allowed to stand in the way of the main objects of state administrative reorganization, namely, to secure unity, efficiency, and popular control, to give the people the largest possible return for the increasing cost of government which they must undergo, in other words, to afford the largest possible benefits of government to the largest possible number of people. Light upon the character of the concrete measures which may be expected to accomplish such objects in state government may be drawn from the organization of the National Government, from recent reforms in municipal organization, and from experience in managing business concerns and corporate enterprises. Such analogies are helpful, provided they are not pushed too far. The states may learn much from the administrative unity and concentrated authority and responsibility in the executive department of the National Government. But the states are essentially municipal in character and their organization should therefore be assimilated to that appropriate for cities, rather than to that appropriate for a national government. Undue insistence upon the principles of separation of powers, checks and balances, and bicameral legislative system, as applied to municipal governments, tends to produce the evils of internal friction which are not counterbalanced by any accompanying advantages. In these respects, therefore, the organization of the state governments should depart from the analogy of the National Government.

The state governments may also learn much, especially in the field of indirect administration, from the organization and management of large industrial enterprises. The stockholders or owning group in business concerns correspond roughly to the political people in state governments, while the operating group corresponds to the personnel of the administration. Improvements in the organization of the administration may be effected on the analogy of the hierarchical organization and concentrated authority in the operat-

ing group of a business concern. In carrying out this analogy, the People's Power League of Oregon proposed the creation of a state business manager to manage the business affairs of the state under the direction of the governor. Greater efficiency and economy could undoubtedly be secured through a more business-like management of the public business. It is to be noted, however, that a business concern differs fundamentally from a government in that it is run for the financial profit of the owners, while the promotion of the general welfare and social betterment are more important objects of governmental activities than that they should be carried on without a deficit. Moreover, business concerns do not attempt to do so many different kinds of things as are included in the multifarious activities of a state government, and, consequently, such governments may legitimately require a somewhat more elaborate organization.

Any fundamental improvement in the position of the state executive involves changes along two lines: first, internal, and, secondly, external. The first implies a readjustment of the relations between the different executive and administrative agencies in the interests of greater unity, responsibility, concentration of authority and efficiency in action. The second implies a readjustment in the relations between the executive authorities on the one hand and the legislature and courts on the other, in the direction of more effective coördination and more harmonious working of the whole structure of government. Although the principle of separation of powers has undoubtedly been carried much too far in its application to the state governments, there is nevertheless some doubt as to whether it would be wise to go to the other extreme and merge the political departments of such governments into one. The executive and legislative departments of the state governments should be brought into much closer and more intimate contact and coöperation than now exists between them, but not into such close relation as entirely to

lose their separate identities. A proper specialization of function for the distinct purposes of formulating and executing public policy requires distinct organs for the proper performance of such functions and some degree of interdepartmental independence in order to prevent undue encroachment by the legislative department upon the appropriate functions of the executive, or vice versa. No unnecessary legal check should rest upon either department in the free and untrammeled exercise of the powers which appropriately belong to it, but such check should exist to prevent the assumption by either department of powers for the efficient exercise of which it is not adapted. The power of the state legislature, provided that body is reorganized along lines of greater efficiency and responsibility, should be increased with respect to its function of formulating public policies, subject only to the limitations of the Constitution of the United States. Its power, however, of encroaching upon the proper function of the executive department by interfering in the details of administration should be considerably curtailed. The legislature should act as the critic of the administration with respect to the results of administrative action, but should not assume the rôle of dictator of the detailed methods and processes whereby the results shall be achieved. Such matters should be left largely to the discretion of the executive authorities, subject only to the limitations of the constitution for the safeguard of individual rights.

There should doubtless also be some curtailment of the power of the legislature to determine the organization of the executive and administrative authorities. Some tendencies in the direction of such curtailment may already be discerned. The constitutions of Nebraska and Arkansas place restrictions on the legislature in respect to the creation of any executive and administrative agencies in addition to those provided in the constitution itself. As already noted, the proposed New York constitution of 1915 provided for a scheme

of administrative organization and prohibited the legislature from creating additional departments. A modification of this plan would be to provide in the constitution for not more than a dozen executive departments, to authorize the legislature to provide by law for their establishment, and to require that all the executive and administrative services of the state shall be organized in one of these departments, unless additional departments are created by statute, which, however, shall require an extraordinary majority vote of the legislature. There would be some decided advantages, however, in placing the organization of the executive services squarely in the hands of the governor, giving him power to organize such services into not more than a dozen executive departments. To this power should also be added that of reorganizing such departments, of transferring any executive service from one department to another, as occasion may require, and of placing new executive services as created within such of the departments as he may deem appropriate.

The governor should, of course, have the power to appoint the heads of the executive departments. Moreover, he should not be prevented by constitutional restriction from appointing members of the legislature to such positions. As early as 1873, Mr. Brodhead submitted a proposition in the Pennsylvania Constitutional Convention of that year providing that "the secretary of the commonwealth, attorney-general, auditor-general, state treasurer, secretary of internal affairs, and the superintendent of public instruction shall be entitled to seats in the house of representatives, and may speak upon questions which shall arise therein relative to their several departments, and may be questioned concerning the same, but shall have no right to vote." [4] It is needless to say that the proposition was rejected, and has not since met with such favor as to bring about the introduction of the reform which

[4] Debates of the Pennsylvania Constitutional Convention of 1873, v, p. 359.

it embodies. Yet such a move would undoubtedly be in the direction of more effective coördination and more harmonious working together of the executive and legislative departments.

The needed readjustment in the relation between the executive and the legislative departments of the state governments is rendered difficult of accomplishment on account of the defective organization of the legislature itself. The legislature is enveloped in a cloud which the searchlight of public opinion can scarcely penetrate; its organization and procedure are so complicated as to afford no definite lodgment for the salutary rays of publicity. It cannot be expected that the legislature will be efficient unless it is so reorganized that able men are drawn to its membership and given larger powers both individually and collectively, nor can it be expected to act under a sense of public responsibility unless its organization and methods of procedure are so simplified as to attract the interest and intelligent attention of the mass of the people.

Light upon the nature of the means calculated to accomplish such a reform of our state legislatures may be drawn from the history of reform in the organization of municipal councils. Our cities were at one time characterized by Mr. Bryce as America's greatest failure in government. Such fruitful efforts, however, have been put forth in recent years towards the improvement of municipal conditions that the states now possess that unenviable distinction and must now look to the cities as pointing the way of reform. It is appropriate that we should turn to the cities for light upon this problem not only because of the important reforms which have been effected in the organization of city councils, but also because of the growing realization that the states are essentially municipal in character and should therefore be assimilated in organization to cities. The essentially municipal character of the states arises from the fact that, though more extensive geographically than cities, they are neverthe-

less governments of a subordinate character, exercising certain powers which, under the National Constitution, cannot be taken away from them by the National Government, just as cities may exercise certain powers which the state constitution protects from invasion by the state government. In other words, the states, not being sovereign or independent governments, have no need for an organization appropriate to such governments. Nevertheless, they have acquired such an organization through the operation of historical causes. The bicameral legislative system in England, evolved for the representation of Lords and Commons in separate houses, was transplanted to this country and applied to the organization of the legislative bodies in nation, states, and cities. In the case of the nation, the need for two houses, one in which the states, and the other in which population, should be represented, added solid reason to historical precedent in supporting the application of the bicameral system. But in the case of the states and cities, no such reason exists. On account of their subordinate municipal character there is no need for an elaborate system of checks and balances, and the bicameral system, as applied to them, should be abolished, unless it can be shown that it increases the care taken in the enactment of legislation, thereby improving the quality of the legislative output. Experience would seem to point in the opposite direction. The bicameral system seems to make for carelessness in legislation, each house expecting the other to correct its errors of haste and judgment, whereas if there were but one house, greater care would be taken because the action on every measure would be of much more consequence. The bicameral system also divides responsibility, each house attempting to saddle upon the other the blame for bad legislation, the people meanwhile being left in the dark as to the exact location of responsibility and hence the real culprits escape. Realization of these facts has led to the introduction of the unicameral system in the majority of the principal cities

of the country. In the unicameral city councils it has been found that friction is reduced and fewer means exist for impeding the passage of salutary measures, nor is the council so easily controlled by sinister influences. No good reason appears why similar results would not follow the introduction of the unicameral legislative body in the states. The functions which are performed separately by the so-called upper house of the state legislature, such as the confirmation of appointments, are mostly executive in character, and it would make for the concentration of responsibility if they were intrusted solely to the executive branch of the government. We conclude, therefore, that one element of reform of our state legislatures would be to get rid of the antiquated second branch.

Turning again to the progress of reform in the cities, we find that the old system of electing members of the city council by wards has in many instances been replaced by a system of election at large without regard to ward lines. This change has tended to secure better men in the council, men who have been able to see beyond the confines of the petty district of the city in which they live, and have been more free to act for the general interests of the whole city. It must be admitted, however, that the city is more of a unit, both geographically and socially, than the state, and it does not, therefore, necessarily follow that the election at large of the members of the unicameral state legislature would have equally good results. The greater diversity of interests and conditions in a state doubtless make local representation a less undesirable element in the organization of the state legislature than in that of the city council. Nevertheless, if the position of members of the legislature should depend upon the suffrages of the whole mass of voters in the state, abler men could in all probability be elected and they would feel more free to act for the general interest and find larger opportunity for working for the promotion of the general welfare.

Each legislator would represent the people of the whole state and the eyes of the voters of the state would be upon each member, thus increasing many-fold his sense of responsibility.

In order to reconcile these opposing considerations, a compromise might be arranged, either by electing some of the members of the legislature by districts and others on a general ticket, or by dividing the state into districts and requiring the member elected from each district to be a resident of that district, but to be elected by the votes of the people of the whole state. Either of these arrangements would tend to combine the advantages and eliminate the evils of both the district and general ticket plans. The main motive for gerrymandering the state would be largely taken away, the general interests would be more carefully safeguarded than at present, while adequate provision would still be made for the representation of legitimate local interests.

The third important municipal reform which we may consider in its bearing upon the reorganization of state government is that known as the commission form of government. The success which this form has attained in many cities has naturally given rise to the question as to the feasibility of its application to states. Thus far this question has received surprisingly little consideration. The recent recommendation of former Governor Hodges of Kansas has, however, brought it into prominence. His proposal, however, is not, strictly speaking, for the commission form of government in the states. He recommends that two members of the legislature be elected from each Congressional district in the state to form the single-chambered legislature, and that the governor shall be *ex officio* a member and presiding officer of this assembly. This suggested reform follows in main outline the proposed constitutional amendment submitted to the voters of Oregon, but rejected by them. This was a plan to abolish the state senate, and to give the governor membership in the

house, with the power of introducing all appropriation bills. Both of these plans bring the legislative and executive branches of the government into closer contact. They disregard the outworn principle of the separation of powers, and increase the control of the governor over legislation.

The size of the unicameral legislature over which, under these plans, the governor would preside, would, of course, depend, to some extent, upon the size and population of the state. The districts, however, should be made sufficiently large so that the legislature would not be cumbrous in action, nor require elaborate and complex rules of procedure. The smaller the body, the more intelligible is its procedure apt to be, the less opportunity for the manipulations of the political tactician and the greater the sense of responsibility which rests upon each individual member. The small size of the legislature would enable the state, without additional expense, to pay the members sufficient salaries so that they could devote their whole time and attention to their official duties. And, instead of meeting at stated intervals for short periods, they could meet whenever required by the condition of the public needs. The state would be able to save money not only in salaries, but, in much greater measure, from the greater efficiency and more business-like management of the public business.

In the commission form of government as found in cities both executive and legislative powers are lodged in the hands of the same body. It is doubtful, however, whether it would be expedient to apply this feature without modification to the state governments. The danger of intrusting the appropriating and spending powers to a single body would probably be greater in the case of the states. Furthermore, if the governor has no important functions separate from those of the commission, his identity would probably be merged in with the commission and the state government, like a pyramid without an apex, would lack a responsible head. To avoid,

therefore, this disadvantage of what may be called the pure commission form of government, the governor alone should be at the head of the state administration, while at the same time holding his seat in the small unicameral legislature.

The changes outlined above in the organization of our state governments would doubtless necessitate constitutional revision of considerable magnitude. Aside from the legal difficulties, there would also be the opposition of party organizations and of various sinister influences which thrive under present conditions. Opposition from these sources, however, would merely be an added evidence of the desirability of the change. Another source of opposition would doubtless be encountered in those ultra-conservatives, who are unable to rid themselves of preconceived ideas based on historical traditions or fictions. But there is little more reason why we should retain an outworn instrument of government than that we should continue to use antiquated methods of manufacture, production, or transportation. As indicated by recent developments in various states, signs are not wanting that the manifest incongruities and maladaptations of the present system may in the near future force the American people, in spite of all opposition, to effect a radical reorganization of the state governments.

If such a reorganization is brought about, it would admirably supplement a movement now in progress toward increasing the power of the state executive. One of the most promising tendencies in state government today is the increasing control of the governor over legislation, for it makes indirectly for an increased popular control over the state business. But this tendency is at present checked and hampered by the cumbrousness of the legislative machinery. It is like employing an able and efficient chauffeur for a lumbering antiquated machine, which can be made to move in the right direction only slowly and spasmodically. The ability of the governor to exercise a positive influence upon the

course of legislation arises largely from the publicity which he is able to throw upon its processes, thereby fixing responsibility where it belongs. The present organization of the legislature, however, is ingeniously adapted to avoid publicity and evade responsibility. Hence the proposed reorganization and simplification of the legislative machinery is a necessary means toward increasing the efficiency of executive control. It will afford a more adequate lodgment for the rays of publicity through the greater definiteness in the location both of power and of responsibility. The governor, sitting, speaking, and voting in the small, compact, wieldy legislature will command public attention and his enlightened recommendations will be supported by irresistible public opinion. The executive and legislative branches of the government will be effectively harnessed together in the common public service.

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